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Ruling Cases.

ARRANGED, ANNOTATED, AND EDITED

BY

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OF LINCOLN'S INN, BARRISTER-AT-LAW, ADVOCATE OF THE SCOTCH BAR,
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ASSISTED BY OTHER MEMBERS OF THE BAR.

WITH AMERICAN NOTES

BY

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THE ALBANY LAW JOURNAL.

VOL. XIII.

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RULING CASES.

INFANT.

See also No. 3 of "AGENCY," 2 R. C. 281; and No. 4 of "CONTRACT," and notes, 6 R. C. 43 *et seq.*

No. 1. — BECKFORD *v.* TOBIN.

(CH. 1749.)

No. 2. — HILL *v.* HILL.

(CH. 1814.)

RULE.

A LEGACY to an infant carries interest by way of maintenance from the death of the testator, where the legatee is a child, or person to whom the testator has placed himself *in loco parentis*, or where from special circumstances an intention to give interest clearly appears.

Beckford *v.* Tobin.

1 Vesey, Sen. 308-312.

Infant's Legacy. — Interest for Maintenance. — Presumed Intention.

Construction of will. Interest of legacy from death of testator, on the [308] manifest intent as to maintenance.

Sir James Tobin having an estate in South Sea and East India stock, leasehold, and some shares in ships, by his will gave £4000 to two trustees, to be paid and applied in such manner as he should, by writing under hand and seal, order and direct; making them and two other persons executors.

Afterward, by a codicil, he directs the trustees to apply the £4000 to the uses of a boy called Michael, aged five years, and then living with John Tobin; and his maintenance and education to be paid out of the interest of that £4000.

This was an appeal from a decree in 1739.

For the appellant. Interest for this legacy should commence from the death of the testator; and as to the rate, in general, where it is out of personal estate, it stands as a debt on the estate; and therefore is a debt which will bear the legal course of interest, as even a voluntary bond will. So a contract for any sum with interest means legal interest, and here the word "interest" is mentioned. In several cases his Lordship [309] has determined that a general legacy, without mention of interest or any time, should bear five per cent, and it is the constant rule where out of personal estate; unless an intent shown to carry less than the legal interest: but not so where out of land, as no real estate, commonly speaking, produces more than four. This is the whole provision for an infant; and by one obliged by nature to provide for him, as his illegitimate son. The testator has given interest, and the Court will construe it legal interest; which takes it out of the discretion of the Court, as much as if the testator had given legal interest. No laches can be imputed, as he was an infant at the time of the decree.

For the residuary legatee. There is no direction in the will to pay the interest from the death of the testator, nor anything to take it out of the common case of a legacy's not being payable till one year after; the presumption in favour of a legitimate child not holding in the case of one who is a mere stranger having a legacy. The time of making the will in 1732 is material; for from thence to the time of the decree no more than four could be got, till the exigency of the government upon the war with Spain raised the value of money; and then the Court, where out of personal estate, gave five, because the value of money was five in government securities. There are also particular circumstances to distinguish this legacy, and to give but four per cent, although five should be given for the other legacies in the will. The trustees actually have the money in their own hands. If, then, they do not place it out, as they ought, the Court will make them pay that interest, which could have been got, if placed out; beyond which they cannot be charged. The Court does not supply in favour of natural children by the same rules as for legitimate children; such as the defect of surrender, and the mother's covenant to stand seised to the use of her natural child is void; there being no blood. It cannot be reduced to a certain rule here what interest shall be

No. 1. — *Beckford v. Tobin*, 1 Ves. Sen. 309, 310.

given for a legacy, no more than at law what damages a jury shall give; wherever the thing exceeds the demand for it, the price is lowered. So in money as well as other commodities. Exigencies will vary the rate of interest; and there are several cases where four has been given, though out of a personal fund. The best rule to go by is, what interest could in general be got at that time; and there was no fund then upon which five could be got. Land or government securities were the only two things upon which the trustees could fairly lay it out: unless, perhaps, by small sums to tradesmen; upon which, if any failure, the Court would make them suffer. The infant only acquiesced under an order without complaining that he had a lower rate of interest than he ought.

LORD CHANCELLOR (Lord HARDWICKE).

As to the first question, I am of opinion that in this particular case there ought to be interest from the death of the testator, and not only from the end of one year after. The [310] rule is true, that the interest of a general legacy, for which no time is appointed, is from the end of one year; which is strengthened by the Statute of Distribution giving one year in the case of intestacy to distribute; the same reason holding where there is a will and executors; yet that rule was not founded upon that statute, being a rule of this Court before, who took it from the Ecclesiastical Court, which gave the executor a year to get in the estate, and pay the legacy, before he should be compelled to give an account, &c. And as this Court has a concurrent jurisdiction in the case of legacies, it has followed that rule, that there might be no variance in the rule of justice, and allowed that time of a year, where no certain time was mentioned. Yet there are exceptions thereto; one of which is the case of a legacy by a father or mother to a legitimate child, whether by way of portion or not. If it is given generally, the Court will give interest from the death to create a provision for its maintenance; and if payable at a certain age, and the child not otherwise provided for, the Court will give interest in the meantime, before that age. But the Court has not extended this to a natural child, for two reasons: first, from the rule of law considering a natural child as no relation, having, indeed, no civil blood. Secondly, that it is not fit for a Court of justice to give the same countenance to such children as in the case of legitimate children; and, to discountenance practices of that kind, the Court has taken them to be out of all

No. 1.—*Beckford v. Tobin*, 1 Ves. Sen. 310, 311.

such provisions, as the supplying defect of surrender for them, &c. But the ground of the present case is from the words of the will and codicil; although nothing particular can be inferred from the penning of that clause in the will, unless as it takes in the act he did afterward; otherwise there is no pretence that it should carry interest before the end of the year. But in the construction of the legacy the Court must take in the codicil, which must make part of, and have the same effect as if it had been in the will; and then it amounts to a legacy in trust: the trust explains the intent, governs and directs everything relative, and, consequently, the time of payment. As where the trust imports a fee, it shall be so construed; although the words of the devise would not carry it. Then consider what direction this codicil leaves as to the time of payment. No particular time for the commencement of the maintenance and education, which must be meant continuing throughout; and during that whole time the £4000 must carry some interest. The Court has said that interest shall follow the principal as the shadow the body, and that in the case of collateral relations, as in *Acherley v. Vernon* (1 P. Wms. [311] 783), it carried interest before the time of payment came, although the testator directed payment at the time of marriage; and great stress was laid on a case in Lord NOTTINGHAM'S time, where there was an indication of separating it from the bulk of the estate: but there is something decisive here; that unless the Court makes this construction, this child, if he died within the year, would have no maintenance; then no one could expend anything thereout for him, and whoever had maintained him would have lost his money.

As to the next question; in general, the Court exercises as large a discretion as to the rate of interest upon legacies where interest is not particularly given, as in any case, and difficult to reduce it to a certain rule. I do not know that, where the testator has said interest, the Court has held itself so bound, as insisted upon for the appellant, to give the legal interest; but supposing for argument's sake it is so: the testator has taken for granted the £4000 will carry interest. It is to be considered as taken out of the bulk of the estate, to be placed out by the trustees, in whose hands the codicil has considered it distinct from the other two executors. There cannot be a stronger implication than that his intent was such, and their duty was to have placed it at interest

No. 1. — *Beckford v. Tobin*, 1 Ves. Sen. 311, 312.

as soon as possible, and thereout his maintenance was to come, which was his view; and no direction of that kind mentioned so as to confine the Court to legal interest. Then what discretion is to be used? The general rule has been between interest of legacies charged on land and on personal estate; and where nothing more, the Court has said that land never produces profit equal to the interest of money, and will follow the course of things and give interest, where charged on land, one per cent lower than the legal interest. So it was when the legal interest was at six; but in general, where a legacy is out of personal estate, the Court gives five;¹ and unless that is taken to be a sort of rule, there will be no distinction between them. I agree, that notwithstanding this, after the great fall of the value of money and rate of interest, in many cases, where the Court was to give interest by discretion, four only were given, when upon personal estate, as I believe, Sir JOSEPH JEKYLL did; yet the Court laid hold on some particular reason (although, perhaps, not in every case), generally on some inquiry upon what kind of fund or security the testator's estate is placed out; and in some cases sent it to the Master to inquire, and, where they found it did not produce more than four, directed but four; there being then no certain rule, I will not vary this decree as to the rate of interest. It is true the appellant was an infant at the time of the decree, and not precluded by the order made; yet his making no complaint is a kind of waiver. It now comes before me on the general report of the Master; and it appears, on what kind of funds the estate stood out; which, I believe, computing round, did not make quite four; the dividends on the shares of ships being merely contingent. But there is another reason for not varying the decree, from [312] the intention of separating this from the bulk; which, if the trustees had then done, and placed out, it could not have produced more than four, which is a good rule to go by.

But as to the time of commencement, the decree should be varied.

¹ The rate allowed by the Court has been reduced as the current rate has become permanently lowered. For a long time the rate allowed by the Court was £4 per cent. Now it is £3 per cent. See *In re Hubback, Hart v. Stone* (C. A. 4 Feb., 1896), 1896, 1 Ch. 754; 65 L. J. Ch. 271. — R. C.

Hill v. Hill.

3 Ves. & Bea. 183-188 (13 R. R. 175).

Infant's Legacy. — Interest for Maintenance. — Presumed Intention.

[183] Interest from testator's death upon legacies to his grandchildren by implication, the object being a provision and maintenance for the legatees, described as infant orphans, and some of them illegitimate.

Jeremiah Hill, by his will, dated the 2nd of August, 1809, after giving different legacies, proceeded as follows:—

[* 184] * “ I give and bequeath unto Mary Ann Hill, Matilda Lydia Hill, Edward Jeremiah Hill, and Penelope, the four legitimate children of my late son Thomas Hill, deceased, by Ann Hill, late his wife, now his widow, £8000 each, and to Thomas Hill, the eldest illegitimate child of my said deceased son, £10,000, and to Charles Hill, the other illegitimate child of my said deceased son, £6000, the same legacies or sums to be considered as vested interests in all of the said six children respectively, on their attaining respectively the age of twenty-one years or dying under that age, and leaving issue of their respective bodies lawfully begotten; and it is my will, that in the meantime, and until they shall attain respectively as aforesaid, their said respective legacies shall be paid into the hands of William Tanner, of Bristol, gentleman, and William Perry, of the same city, wine merchant, their executors or administrators, as trustees for the said children, and shall be by them laid out in the government stocks or funds, or in such other public or private real or personal securities as they shall think proper, and the interest, dividends, and profits of such respective legacies shall be by them applied in the maintenance and education of the said respective children of my said deceased son, or in their placing out and advancement in the world, or otherwise be accumulated for their benefit at the discretion of my said trustees; and in case any or either of the said six children of my said deceased son shall happen to die under the age of twenty-one years, and without leaving issue of their respective bodies, lawfully begotten, then it is my will that the legacy or legacies of such child or children so dying, with the unapplied interest thereof, if any, shall from time to time, and as often as it shall happen, go to and be divided amongst the survivors or survivor, or others or other of

No. 2. — *Hill v. Hill*, 3 Ves. & Bea. 185, 186.

the said six children, to be vested * in them respectively [* 185] upon their attaining their said respective ages of twenty-one years or dying under that age, and leaving lawful issue as aforesaid; but in case all of them shall die under that age without leaving lawful issue as aforesaid," then he gave and bequeathed over the said several legacies or bequests so given to them as aforesaid, together with the unapplied interest thereof, if any; and he declared his will, that the said trustees, their executors and administrators, shall and may from time to time, during the minorities of the said four children of his son Thomas Hill, deceased, pay or advance to their mother Ann Hill the interest, dividends, and produce of their respective legacies or bequests hereinbefore given to them as aforesaid, or so much thereof as they shall think proper to be by her the said Ann Hill laid out in the maintenance and education of the said four children respectively at her discretion; and her receipt, &c., shall be sufficient discharge, &c.

The bill, filed on behalf of the six infant children of Thomas Hill, alleging that upon the death of their late father, who died insolvent, the testator, their grandfather, took upon himself their care and maintenance, prayed payment of their legacies, with interest from the death of the testator.

The answer of the executors submitted that Tanner and Perry, on behalf of the plaintiffs, were only entitled to payment of their legacies at the end of twelve calendar months from the death of the testator, and to interest to be computed from the expiration of that time.

Sir Samuel Romilly and Mr. Bell for the plaintiffs.

These legacies are given to the orphan children of the testator's son, who died insolvent, two of them described

* as illegitimate, and therefore to be presumed without [* 186] a provision, for their immediate support. The exception, in favour of a child, to the general rule, that a legacy carries interest only from the end of a year after the testator's death, upon the moral obligation of a parent to support his child, has not been extended to grandchildren or illegitimate children: *Crickett v. Dolby*, 3 Ves. 10; but where the testator has placed himself *in loco parentis*, of which this will affords the strongest evidence, the inference is that he intended interest to commence immediately: though the legatee may be his illegitimate child or grandchild:

 Nos. 1, 2. — *Beckford v. Tobin*; *Hill v. Hill*. — Notes.

Beckford v. Tobin, 1 Ves. Sen. 308 (p. 1, *ante*); the reasoning of which case applies strongly; Lord HARDWICKE considering that without this construction the child, if he died within the year, would have no maintenance, and whoever had maintained him would have lost his money. In *Acherley v. Vernon*, 1 P. Will. 783, also, the Court collected the intention to give interest from the circumstances, where it was not expressed.

Mr. Hart and Mr. Wetherell for the defendants, the executors.

This cannot be distinguished from the common case of a legacy payable indefinitely, no time being fixed for that purpose. In *Beckford v. Tobin* the trust to be executed, commencing at the moment of the testator's death, required funds immediately productive. These legacies are given to the children; and trustees are interposed merely to receive the legacies for them, as infants, who could not personally receive them. The discretion, with [*187] which the trustees are invested, as to * maintenance, indicates that the testator thought the legatees had other sources of support. The trustees have no trust to execute until payment of the legacies, which can be claimed only at the end of the year.

Sir Samuel Romilly in reply.

The case of *Beckford v. Tobin*, which has never been shaken, is expressly recognised in *Lowndes v. Lowndes*, 15 Ves. 301, and distinguished. The support of these children appears to be the primary object of the testator; who, contemplating the possibility of their acquiring future fortunes, might very naturally provide for such an event, still considering himself *in loco parentis*.

The MASTER OF THE ROLLS (Sir W. GRANT) said there was no solid distinction between this case and *Beckford v. Tobin*, and therefore the interest must be calculated from the testator's death.

ENGLISH NOTES.

Another decision of Lord HARDWICKE's (which the MASTER OF THE ROLLS in *May v. Potter*, *infra*, mentions as a leading authority) is upon one of the points which arose in the case of *Hearle v. Greenbank* (1749), 3 Atk. 695. There the testator provided for his daughter a certain sum for maintenance until twenty-one, and then gave her a legacy of £8000 to be paid to her when she attained twenty-one years, with a gift over if she died under that age. Lord HARDWICKE says (3 Atk. 716): "I admit where a legacy is given by a father to a

child, though the legacy is not payable but at a certain time, yet the Court allows interest. But in all those cases the ground the Court goes on is giving interest by way of maintenance. Here the testatrix has allotted maintenance for her daughter from the general fund of her personal estate: there is another thing observable, the contingency in her will of the daughter's dying before twenty-one; I agree it is a condition subsequent, but still it shows the view of the testatrix, and that she saw it might never be her daughter's, and therefore to give her interest would be contrary to the intention of the testatrix."

The principle was assumed to be settled law by Lord REDESDALE in the case of *Ellis v. Ellis* (1802), 1 Sch. & Lef. 1. He says (p. 5): "The general principle is that a legacy payable at a future day does not carry interest unless it be from a father to a child who has no other provision, or unless there be something on the face of the instrument from which it can be inferred that the testator considered interest as incident to the legacy. In the cases of a father and child having no other provision, it is considered as a necessary implication that the legacy shall bear interest, because he may be bound to provide maintenance for his child, and having made a provision payable at a future day must be presumed to intend that the child should be supported in the meantime; but this implication is ousted, if he provides any maintenance for the child, however small the maintenance, and however large the legacy." In the case in point there was not the relation of parent and child, nor did it appear (which would have been the same thing) that the testator had placed himself *in loco parentis* to the child.

These cases are all cited by the MASTER OF THE ROLLS in *May v. Potter* (1877), 25 W. R. 507, where a testator left a fund in trust for his grandson absolutely if and when he should attain twenty-five years, with a gift over if he should die without issue under that age, and provided that a sum not exceeding £200 per annum might be applied for his maintenance. On an application that this sum might be increased to £500 out of the income of the trust fund, he held that the presumption that the infant was entitled to the interest of the fund was rebutted by the circumstance that the testator had given a definite sum for maintenance.

The principle acted on by the MASTER OF THE ROLLS in *May v. Potter*, *supra*, was again maintained by the Court of Appeal in the case of *In re George* (1877), 47 L. J. Ch. 118, 26 W. R. 65, where an application was made for an allowance of income by way of maintenance under Lord CRANWORTH's Act (23 & 24 Vict., c. 145, s. 26). Lord Justice JAMES said (47 L. J. Ch. 120): "The rule of law was settled that a contingent legacy did not carry interest, except in the case of a legacy given by a person *in loco parentis* to the legatee;

 Nos. 1, 2. — *Beckford v. Tobin*; *Hill v. Hill*. — Notes.

and that exception was subject to another exception, that it did not take effect where the testator had by his own will fixed a sum for maintenance. This rule was settled many years ago, and now the Court had to apply the statute to the old law."

In this case it also became necessary to consider the section of Lord CRANWORTH'S Act, which is as follows: "In all cases where any property is held by trustees in trust for an infant either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not." Upon this the Court held that although the Act might enable the Court to apply for the benefit of the infant income of a fund as to which he would on coming of age be entitled to the intermediate income as well as the principal, it did not enable the Court so to apply income to which, apart from the Act, the infant could never become entitled.

The section of the Conveyancing, &c., Act, 1881 (44 & 45 Vict., c. 41, s. 43), which now replaces the above-mentioned section of Lord CRANWORTH'S Act, is substantially similar, except that instead of the words "income to which such infant may be entitled in respect of such property," the words are, "income of that property, or any part thereof;" so that there is room for argument that the Court may now apply the income of a contingent legacy whether it is given to some one else or not. But the decisions of the Court of Appeal which have followed the Act of 1881 adopt the construction that where the intermediate income would, according to the true construction of the will, fall into residue to which some person other than the infant is entitled, the Court cannot apply it for the maintenance of the infant. *In re Dickson*, *Hill v. Grant* (C. A. 1885), 29 Ch. D. 331, 54 L. J. Ch. 510, 52 L. T. 707, 33 W. R. 511. But where the capital is given to a class who shall attain twenty-one, then each of the infants under that age is contingently entitled to the income of a share, and the Court may apply that income to his maintenance. *In re Holford*, *Holford v. Holford* (C. A. 1894), 1894, 3 Ch. 30, 63 L. J. Ch. 637, 70 L. T. 777, 42 W. R. 563, a case in which the previous authorities are fully discussed. The last decision was followed by NORTH, J., in the case of *In re Jeffery*, *Arnold v. Burt* (1895), 1895, 2 Ch. 577, 64 L. J. Ch. 830, 73 L. T. 332, 44 W. R. 61, in effect reviewing a previous

decision which had been overruled by the Court of Appeal in the case of *In re Holford*. Having regard to the questions which have arisen upon the construction of the section, it has been a general practice of conveyancers to ignore it, and to insert explicit directions as to maintenance: a practice which has the additional advantage of informing the trustees what they may do, instead of leaving them to employ a lawyer to search the Acts of Parliament and decisions or to apply to the Court for directions.

It is obvious that this section of the Conveyancing Act does not apply to property the vesting of which is postponed beyond the period of attaining twenty-one years; and apparently the Court cannot, under the section, order the application of the income where the vesting may be postponed beyond that period. *In re Judkins Trusts* (1884), 25 Ch. D. 743, 53 L. J. Ch. 496, 50 L. T. 200, 32 W. R. 407.

It is to be observed that the rule which, in the ordinary case of a general legacy out of personal estate, postpones payment for a year from the testator's death is taken from the practice in the Ecclesiastical Courts where a year is given to the executor to collect the effects. But where a legacy is charged upon land only, and no day of payment is fixed, interest must be chargeable from the death of the testator or not at all. Per Lord REDESDALE, L. C. of Ireland, in *Pearson v. Pearson* (1802), 1 Sch. & Lef. 10, 9 R. R. 1. So that in the case of a legacy so charged it is unnecessary to look for any such implied intention as is found in the above cases.

AMERICAN NOTES.

This principle is enforced in *Sullivan v. Winthrop*, 1 Sumner (U. S. Circ. Ct.), 1; *Magoffin v. Patton*, 4 Rawle (Penn.), 113; *Allen v. Crosland*, 2 Richardson Equity (So. Car.), 68; *King v. Talbot*, 40 New York, 76; *Cooke v. Meeker*, 36 New York, 15 (citing the principal cases); *Lupton v. Lupton*, 2 Johnson Chancery (New York), 614; *Brown v. Knapp*, 79 New York, 137 (citing *Hill v. Hill*); *Loring v. Woodward*, 41 New Hampshire, 393; *McWilliams v. Falcon*, 6 Jones Equity (No. Car.), 235. STORY, J., in *Sullivan v. Winthrop*, *supra*, said: "There are exceptions, however, to the general rule. One is when a legacy is given by a parent to an infant child, who is otherwise unprovided for; for then, upon the presumed intention of the parent to fulfil his moral obligation to maintain his child, interest will be allowed from the death of the testator as a maintenance for the child, where no other fund is applicable for such maintenance. And this is equally true whether a future time is fixed for the payment of the legacy, or no time is fixed for it by the will. But if other funds are provided for the maintenance of the child, then interest is only allowable as in other cases. The same doctrine which applies to parents is also applied to testators placing themselves *in loco parentis*; though perhaps upon the cases the distinction is sometimes very nice, if not evanes-

No. 3. — Bathurst v. Murray, 8 Ves. 74. — Rule.

cent, as to what constitutes the assumption of such a relation. *Acherley v. Vernon*, 1 P. Will. 783, and *Churchill v. Speake*, 1 Vern. R. 251, are supposed to have proceeded upon this ground, as *Beckford v. Tobin*, 1 Ves. 307, and *Hill v. Hill*, 3 Ves. & Beames, 183, most assuredly and satisfactorily did. But the exception is not allowed in favor of a legatee standing in the relation of a wife, or natural child, or grandchild, or niece, as such, any more than in favor of a stranger, unless there can be further engrafted upon it a *parental* relation assumed by the testator."

See also *Jordan v. Clark*, 16 New Jersey Equity, 243. "The exception is as firmly established as the rule itself." *Cooper v. Scott*, 62 Penn. State, 141.

But it does not apply to a natural child or niece: *Sullivan v. Winthrop*, *supra*; nor to a godchild: *Page's Appeal*, 71 Penn. State, 402; nor to a grandchild: *Lupton v. Lupton*, *supra*; *Walker v. Walker*, 17 Alabama, 396; *Leech's Appeal*, 44 Penn. State, 140 (*contra*, *Bowman's Appeal*, 34 *ibid.* 19); *Weatherly v. Kier*, 38 New Jersey Equity, 87.

Nor where there is any provision for maintenance. *Lupton v. Lupton*, *supra*; *Sullivan v. Winthrop*, *supra*; *Williamson v. Williamson*, 6 Paige (N. Y. Chancery), 299; *Seibert's Appeal*, 19 Penn. State, 54; *Jordan v. Clark*, *supra*; *Chisholm v. Chisholm*, 4 Richardson Equity (So. Car.), 269.

Nor where the legatee is an adult, although in delicate health, and always supported by the testator. *Thorn v. Garner*, 113 New York, 198.

No. 3. — BATHURST v. MURRAY.

(CH. 1802.)

No. 4. — IN RE LEIGH, LEIGH v. LEIGH.

(C. A. 1888.)

RULE.

ALTHOUGH the Court of Chancery can insist, as one of the terms of purging his contempt, that a person who has married an infant ward of Court shall execute a marriage settlement containing provisions settled by the Court, there is no jurisdiction to compel the infant ward to do so.

Bathurst v. Murray.

8 Vesey, 74-79 (6 R. R. 230).

Infant. — Ward of Court. — Settlement.

[74] Upon the marriage of a female ward of the Court all parties concerned were ordered to attend; and the husband was committed, and restrained from receiving her visits; and she consented to quit her residence with a friend of his, under an intimation from the Court that she would otherwise be compelled to do so.

No. 3. — Bathurst v. Murray, 8 Ves. 74, 75.

The husband after some time was permitted to propose a settlement.

The LORD CHANCELLOR would not admit a provision for children by a subsequent marriage by way of absolute settlement, but only by a power to the wife to charge by way of appointment to each child a share not exceeding the share of each child by the first marriage.

The husband to have some part of the income independent during coverture. The wife having by the proposed settlement a power of appointment in case of no children and the husband surviving, the limitation in default of appointment was directed to be to her next of kin, exclusive of the husband.

The Master finding that the marriage was invalid, a marriage by banns was directed.

A petition was presented by the guardian of a young lady, a ward of the Court, stating, that she had, without the consent of the petitioner, gone to the island of Guernsey, where a ceremony of marriage had been performed. She was only of the age of sixteen, and was entitled, under the will of her father, to a very considerable fortune at the age of twenty-one or marriage with consent, with a limitation over in case of her death before that age, not being so married. The affidavits stated that the young man was the son of a miller, and apprentice to a silversmith, and that his father and brother and master and mistress were concerned in this transaction.

The parties attending in Court by order, the LORD CHANCELLOR made an order that the husband should be committed to the Fleet, and that he should not admit her visits there; and that the father and brother and master and mistress should attend in Court on the next day of petitions.

His Lordship said he should use the animadversion of the Court to compel the father, if a man of property, as * he [*75] was represented to be by the affidavit of his son, and unless he should show that he was not implicated to make that provision, that might have been expected upon a marriage properly contracted, as Lord THURLOW wished to do in a case where the husband's father was a man of considerable property in the city; but it could not be made out that he was a party concerned in bringing about the marriage.

Doubts being expressed as to the validity of the marriage according to the laws of Guernsey, an inquiry was directed as to that.

Upon a subsequent day it appeared that the infant was residing with a hair-dresser, a connection of the husband's.

The LORD CHANCELLOR said if she would not consent to go to

another residence he would consider whether by the jurisdiction of the Court over infants he could not take possession of the person of the ward, and compel her to do so.

The next day she expressed her consent to go wherever his Lordship thought proper.

At the close of the sittings after Trinity Term, 1802, an order was made that the husband should be at liberty to lay a proposal for a settlement before the Master, and the LORD CHANCELLOR said, that upon seeing that an order could be made, that they should be well married, the Master having stated by his report that the marriage was void.

The husband was not discharged.

[*76] * A petition was presented by the husband, praying to be discharged on executing a settlement approved by the Master. The proposal was to settle her fortune, the income of which was £800 a year, upon trust as to the whole interest and dividends for her sole and separate use for their joint lives; after her decease in his life to pay an annuity of £200 to him for life, the residue, subject to a provision for maintenance, to accumulate, and with the whole principal in trust for the children at their respective ages of twenty-one or marriage; and if but one, the whole to that one: if there should be no children, or all should die under twenty-one and unmarried, and the wife should die under twenty-one, in trust for the person entitled under the will of her father in that event; if after twenty-one, according to her appointment by will, and, in default of appointment, for her personal representatives; and in case of her attaining the age of twenty-one, and surviving her husband, and no child who should live to attain a vested interest, in trust for her executors, &c.

The settlement contained a proviso, that in the event of a second marriage two-thirds or one-half, according to the number of the children, should be settled upon the child or children of that marriage.

The LORD CHANCELLOR disapproved the settlement upon the children of a subsequent marriage, thinking that it ought not to go farther than to give her a power by way of appointment to provide for such a case.

Mr. Alexander and Mr. Thomson, for the petition, said that was Lord ROSSLYN's opinion, and was followed in the [*77] * *Case of Mr. Bowes* and also in *Lady Carberry's Case*.

The next day Mr. Thomson stated that upon the settlement on the marriage of Mr. Bowes with Miss Carpenter, a ward of the Court, entitled to real and personal estate upon attaining the age of twenty-one, Lord ROSSLYN suggested the possibility of her being early a widow, and thought some provision should be introduced as to that, which was accordingly done in this way: that if she should attain the age of twenty-one, and he should die in her life, it should be lawful for her by deed or will to charge all or any part of the freehold and copyhold estates, and also the personal funds, for the children of a subsequent marriage, without prejudice to the children of the first marriage, with certain sums, according to the number of children; the difference between that settlement and this proposal being that the former left it purely in her appointment; but this proposal is for an actual settlement on the issue of a second marriage.

The LORD CHANCELLOR (Lord ELDON).

That is going too far. This is a very complicated provision, and it may endanger the interests of the children by the present marriage. According to this proposal it is possible that there may be issue by the first marriage, who may die leaving issue, and they would take nothing. I also have a strong inclination to give the husband something out of the income; there cannot be much expectation of happiness where the husband has nothing and the wife has the whole control over the property. He ought to have some income during the coverture, and she ought to have the power of increasing that by *her will, and that [*78] may be the most rational thing for the benefit of the children. This leads also to his contracting debts; and no separate provision will relieve her from the pressure of that situation.

The LORD CHANCELLOR.

I think the husband ought to have £150 a year during the coverture, with a power to her by her will to increase his annuity to £300 a year. As to the provision for a second marriage, the best way will be to give her a power to charge in such a way that each child of the second marriage shall take a sum not exceeding that of each child by the first, but only a power; for, if she should marry again, I hope that marriage will be more provident; and if a fortune should be brought in sufficient to provide for the children of that marriage, it would not be right to make it compulsory upon her to provide for them out of this fund. I mean,

No. 4. — *In re Leigh, Leigh v. Leigh*, 40 Ch. D. 290, 291.

not that the children of the second marriage should take as much as the children of the first, *per stirpes*, if I may so express it, but that each child of each marriage should take the same; each child by the second to take a sum not exceeding that of each child by the first; but not making it compulsory upon her to give them equal shares with each of the first under any circumstances.

As to the event of her death in the life of her husband above the age of twenty-one, without children, and without having made any appointment, in that case the property must go to her next of kin, exclusive of her husband. She will still have the power of giving it to him if he behaves well; and that is all the Court can do in these cases.

The settlement was varied accordingly, and it was ordered that they should be married by banns.

* The LORD CHANCELLOR refused an application of the [*79] husband to be discharged on undertaking to make a settlement, observing that he had the rules, and that there were several of Lord HARDWICKE's orders for committing the party to close confinement.

In re Leigh, Leigh v. Leigh.

40 Ch. D. 290-297 (s. c. 58 L. J. Ch. 306; 60 L. T. 404; 37 W. R. 241).

Ward of Court. — Marriage in Contempt. — Settlement. — Jurisdiction. — Infants' Settlements Act (18 & 19 Vict., c. 43).

[290] The Court has no jurisdiction to compel an infant ward of Court to make a settlement of his own property because he has been guilty of contempt in marrying without leave.

A defendant to an action in which he was made a ward of Court married without leave, being in the twentieth year of his age. About eight months afterwards, he having in the meantime attained the age of twenty, an order was made on the application of his testamentary guardian in the action and in the matter of the Infants' Settlements Act, that a proper settlement of his property should be settled by the Judge, and that he should execute the settlement when so settled. He accordingly executed a settlement approved by the Judge. As

soon as he attained twenty-one he brought his action to set aside the settlement, and also appealed against the order directing it. He deposed that he had always objected to the settlement, and executed it only because he thought he should get into trouble if he did not.

Held, that the order for a settlement must be discharged, for that the Court had no jurisdiction to compel the ward to make the settlement, and the order was in form and substance an order *in invitum*, and could not be construed as merely authorizing him to execute a settlement which he was willing to make.

No. 4. — In re Leigh, Leigh v. Leigh, 40 Ch. D. 291, 292.

Whether, after such a lapse of time, the settlement could be treated as made "upon the marriage" within the meaning of the Infants' Settlements Act, *quære*.

Whether the Act can be resorted to after a male infant who marries under the age of twenty attains that age, *quære*.

A suit was instituted in 1875 for the administration of the estate of Henry Blundell Leigh, and a decree was made in due course. Richard Cecil Leigh, one of the testator's sons, was a defendant, and his testamentary guardian was his mother, the testator's widow, who was one of the plaintiffs. He was born on the 2nd of April, 1866, and on the 17th of October, 1885, he married without the leave of the Court, being, as will be observed, under the age of twenty. He took a large interest in his father's estate.

A managing clerk of the then solicitors of the family deposed that on the 7th of June, 1886, he had an interview with R. C. Leigh, and spoke to him as to his contempt of Court, and explained to him that the proper course would be for him to at once submit himself to the judgment of the Court, and execute such settlement as the Judge might direct. That R. C. Leigh at first stated his wish that the settlement should be delayed till he came of age, but eventually concurred in the proposal that the Court should be asked to approve a settlement, but said he must have some income at once, and wished the deponent to apply for the allowance of £2000 a year until his majority.

On the 10th of June, 1886, an order in the cause and in the matter of the Infants' Settlements Act (18 & 19 Vict., c. 43) was made by Mr. Justice KAY, on the application of Mrs. Leigh, the widow, as testamentary guardian of R. C. Leigh, for an inquiry whether R. C. Leigh had contracted a valid marriage, "and if so, it is ordered that a proper settlement of the property of the said infant upon such marriage be settled by the Judge. And it is * ordered that the said infant, R. C. Leigh, do execute [* 292] such settlement under the provisions of the above-mentioned Act." The order continued an allowance of £2000 a year previously directed to be paid for the benefit of R. C. Leigh, and made provision for raising £6000 for payment of his debts.

The question whether the Court had jurisdiction to make an order *in invitum* upon the infant to execute a settlement of his property was not raised before Mr. Justice KAY.

On the 16th of December, 1886, R. C. Leigh executed a settle-

ment, approved by the Judge, of a considerable part of the property to which he was entitled under his father's will.

On the 2nd of April, 1887, R. C. Leigh, having attained twenty-one, commenced an action to set aside the settlement, and also gave notice of appeal from the order of the 10th of June, 1886, asking that so much of that order as directed a settlement might be discharged, and that the settlement might be cancelled, and that if the Court should consider the order to be an interlocutory order which ought to have been appealed from within twenty-one days, the Court would allow the appeal to be brought, though that period had expired.

R. C. Leigh made an affidavit, in which he deposed that he from the first objected to the settlement, and executed it "believing that if I did not I should get into trouble for disobedience to the order of the Court, and should be deprived of any allowance for the support of myself and my wife during the remaining period of my minority. But for these considerations I would not have executed the settlement."

Romer, Q. C., Dauney, and Reginald Neville, for the appeal:—

We contend that the Court has no jurisdiction to make an order against an infant *in invitum* to make a settlement of his property, because he has been guilty of a contempt. *In re Murray*, 3 D. & War. 83; *Buckmaster v. Buckmaster*, 35 Ch. D. 21, 56 L. J. Ch. 379; s. c. *sub nom. Seaton v. Seaton*, 13 App. Cas. 61, 57 L. J. Ch. 661; *Field v. Moore*, 7 D., M. & G. 691, 699, 24 L. J. Ch. 161. When the order now under appeal was made, *Buckmaster v. Buckmaster* had not been heard by the Court of Appeal. The [* 293] language of the Infants' Settlements Act (18 & 19 * Vict., c.

43), s. 4, shows that the consent of the infant is necessary to any disposition under the Act: it gives the Court no power to make an order *in invitum*.

Hastings, Q. C., and Swinfen Eady, for the respondents:—

Assuming the Court to have no jurisdiction to order a person to execute a settlement, still, if the party assents to the order and executes the settlement, it will be good. The settlor got consideration for the settlement in the allowance of £2000 a year and the provision for his debts.

[BOWEN, L. J.—This is an appeal from the order, and if the order is *ultra vires*, how can the subsequent conduct of the appellants affect an appeal from it?]

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We say the Court had jurisdiction to commit the appellant for his contempt in marrying without leave; he was released from the consequences of his contempt, and obtained a sum to pay his debts in consideration of his executing the settlement. He in fact assented to the making of the order: it was in substance an order giving him leave to make a settlement. An infant who executes a settlement and thereby escapes being committed cannot say that he was coerced into making the settlement.

[COTTON, L. J.—The order does not express that the infant made the settlement that he might be excused from the consequences of contempt. It proceeds on the footing that the Court had jurisdiction to order him to execute it, and he must have supposed that such was the case. It is a positive order, for breach of which he might have been committed, not an order giving him leave to make a settlement. Then, moreover, was this a settlement “upon” the marriage so as to come within the Infants’ Settlements Act?]

In re Sampson and Wall, 25 Ch. D. 482, 53 L. J. Ch. 457, shows that the settlement may be made after the marriage.

[BOWEN, L. J.—The Act provides that nothing in it shall apply to a male infant under twenty, or to a female infant under seventeen. Here the marriage took place before the appellant had attained the age of twenty.]

* *In re Phillips*, 34 Ch. D. 467, 56 L. J. Ch. 337, is a decision that where an infant marries under the prescribed age the Act may be resorted to when that age has been attained. Where there has been a contempt in solemnizing a marriage, the Court can refuse to allow the funds to be paid out till a proper settlement has been executed. *Martin v. Foster*, 7 D., M. & G. 98. That principle applies here.

[COTTON, L. J.—That case appears to proceed on the ground that the husband, who had committed a contempt in marrying the ward, should not be allowed to take advantage of his own wrong by getting the wife’s property without making a proper settlement.]

Method, for the trustee of the will.

COTTON, L. J.:—

This is an appeal brought by leave after the regular time for appealing against an order made by Mr. Justice KAY. It is an appeal by a Mr. Leigh, who lately attained twenty-one. He, when he was under twenty, married a lady, now his wife, and more than

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six months after he had so married an order was made by Mr. Justice KAY directing an inquiry whether there was a valid marriage, and if so, directing a proper settlement to be settled by the Judge; and he was ordered to execute a settlement as so settled. He did execute the settlement in December, 1886, and as soon as he attained twenty-one he appealed against the order. Now, was the order right? I think not, looking upon it as an order made by the Judge against the infant *in invitum*, ordering him to deprive himself of a considerable interest in his property. In my opinion, however good it might be for the parties, the Court of Chancery has no jurisdiction or power to make any such order. If the appellant committed a contempt of Court by marrying without the leave of the Court, for that he might be sent to prison, but that would not give the Court power to order him to execute a settlement by which he deprived himself of his own property. It would be very different if he married a female ward of Court, and so obtained certain rights as her husband over her property. [* 295] Then the Court commits him for contempt of * Court, and allows him to purge himself of his contempt by depriving himself of all the benefits from the property of the woman which by committing the contempt he had obtained. But in the case of *Buckmaster v. Buckmaster*, 35 Ch. D. 21, 56 L. J. Ch. 379, we expressed our opinion, which was concurred in by the House of Lords, that there is no jurisdiction to compel a ward of Court to settle his own property.

It was suggested ingeniously by Mr. Hastings that the application to Mr. Justice KAY must be looked upon as an application by the husband to have liberty to exercise the powers of the Infants' Settlements Act. Now, the order was not made till June, 1886, the marriage having been in October, 1885, and the settlement was not executed till December, 1886. I am going to decide the case upon another point, but it must not be considered that I in any way acquiesce in or favour the suggestion that this can be considered a settlement "upon the marriage" so as to come within the Act. The words of the Act are "upon or in contemplation of the marriage." In *In re Sampson and Wall*, 25 Ch. D. 482, 53 L. J. Ch. 457, the majority of the Court differed from me in construing those words as meaning "on the occasion of the marriage," and in holding that the Act applied to post-nuptial settlements. But I see nothing in their judgment which would

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in any way favour the conclusion that this settlement can be considered as a settlement made upon the occasion of the marriage, when there was this considerable length of time intervening between the marriage and the order of the Court. The House of Lords left that point open, and I do not think it necessary to decide it here, because in my opinion the application cannot be looked upon as an application by the male infant. The solicitor told him, and no doubt he told him what was quite true, "You had better submit to the Court, otherwise you may be sent to prison." But the appellant was not told "the Court has no power to order you to make a settlement of your own property; it can only commit you." The application cannot, in my opinion, be looked upon as an application made with the consent of the infant or for him by the guardian, but as a proceeding against him to force him to execute a settlement whether he wished it or not. In my opinion this was not an application under the Infants' Settlements Act, but an * application made in [* 296] the view that the Court had power to order the appellant to execute a settlement of his own property, and therefore Mr. Graham Hasting's argument cannot be maintained.

In my opinion the appellant has a right to claim from the Court the discharge of the order, and of the settlement which, under the circumstances stated, he executed.

LINDLEY, L. J.: —

I am of the same opinion.

It is quite obvious from the note taken of Mr. Justice KAY's judgment that this point about the jurisdiction of the Court was passed over *sub silentio*: it was assumed, and not argued or discussed. The decision of this Court in *Buckmaster v. Buckmaster*, 35 Ch. D. 21, 56 L. J. Ch. 379, had not then been pronounced, and it seems to me to have been taken for granted that if a ward of Court married, the Court had power to make him execute a settlement. I confess that that erroneous idea was more or less prevalent till it was carefully examined in this Court and in the House of Lords in *Buckmaster v. Buckmaster*, 35 Ch. D. 21, 13 App. Cas. 61; but it is now well settled that the Court has no jurisdiction to compel an infant ward to make a settlement of his own property. If that had been present to the mind of Mr. Justice KAY, this order would not have been made. The order is wrong in point of form. The Infants' Settlements Act says that the infant may make the

settlement with the sanction of the Court, but it does not give the Court power to make a compulsory order which it could not make before. It gives to infants, in the case of a male over twenty, and in the case of a female over seventeen, capacity to do, with the sanction of the Court, that which they could not before ; viz., to make binding settlements. I am satisfied that the order under appeal was made *per incuriam*, and it is an order that cannot stand.

Then it is said that the order may be upheld on the ground that it really was an order sanctioning a settlement made by the infant. That question depends upon the facts : the facts do not support the contention, nor does the order. The order is an imperative order, and the young man would understand, and the solicitor who advised him would also understand, that in the case [* 297] * of such an order he would have no option. It is true that this gentleman had represented to him the position that he was in ; but the effect of all that is simply this : “ You are in a scrape, and you must do whatever the Court tells you in order to get out of it.” He had no option, and it was never pointed out to him that he was at liberty not to make a settlement if he liked. I am satisfied, for the reasons which have already been given, that this order is one which cannot possibly be maintained.

BOWEN, L. J. :—

I am of the same opinion, and have nothing to add.

COTTON, L. J. :—

I think I ought to add that we do not in any way enter into the question as to whether the Infants’ Settlements Act applies where a male infant marries under the age of twenty. We give no opinion upon that point.

The Court doubted whether it had jurisdiction on the present appeal to direct the settlement to be cancelled, though their decision made it worthless. Their Lordships, therefore, only discharged the order appealed from, leaving the action to set aside the settlement to go on.

ENGLISH NOTES.

The right of guardianship, and the jurisdiction of the Court (formerly the Court of Chancery) in the matter, are discussed with great learning in the case of *Eyre v. Countess of Shaftsbury* (1722), 2 P. Wms.

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103; Gilb. Eq. Rep. 172; 2 Wh. & Tud. L. C. From this case and from the case of *The Marquis of Bute* (1861), 2 Giff. 582, 9 H. L. Cas. 440, it appears that an order of the Court on petition, either confirming a testamentary guardian or constituting a guardian for an infant, makes that infant a ward of Court. And where a suit in chancery was instituted by bill relative to the estate or person of an infant, the infant, whether plaintiff or defendant, and even during the lifetime of the father or of a testamentary guardian, became immediately, on the filing of the bill, a ward of the Court. *Hughes v. Science* (1740), 2 Eq. Ca. Abr. 756, pl. 14.

So, no doubt, the issue of the writ in an action, and (probably) of an originating summons (which has been held to be an action: *In re Fawsitt, Galland v. Burton* (C. A. 1885), 30 Ch. D. 231, 54 L. J. Ch. 1131, 55 L. J. Ch. 568, 53 L. T. 271, 34 W. R. 26, 158), will under the modern practice make the infant who is a party and whose property is affected a ward of Court.

An order made on petition under the Trustee Relief Act for payment of dividends to the testamentary guardian of an infant for her maintenance has been held to make the infant a ward of Court. *In re Hodge's Settlement* (1857), 3 K. & J. 213. And so has an order made on summons, without suit, for the maintenance of an infant. *In re Graham* (1870), L. R. 10 Eq. 530, 39 L. J. Ch. 724, 22 L. T. 904, 18 W. R. 988. But it has been held that the mere payment into Court of money belonging to an infant under the Legacy Duty Act (see now the Trustee Act, 1893, ss. 42, 50), or under the Lands Clauses Consolidation Act, does not make the infant a ward of Court. *Re Hillary* (1865), 2 Dr. & Sm. 461, 12 L. T. 840, 13 W. R. 959; *Ex parte Brewer* (1865), 2 Dr. & Sm. 552. Nor apparently do the proceedings on a petition for enabling an infant to make a settlement under the Infants' Settlements Act, 1855 (18 & 19 Vict., c. 43). It is not the intention of the Act that parties who are infants should not marry without the sanction of the Court. *In re Dalton* (1856), 6 De G., M. & G. 201; and see *Re Catherine Strong* (1857), 26 L. J. Ch. 64.

The case of *Eyre v. Countess of Shaftsbury*, *supra*, shows that the mother of an infant ward of Court who assists a marriage of the ward without the sanction of the Court, commits a contempt. So does any other person who aids such a marriage. *Butler v. Freeman* (1756), Ambl. 301. And it appears by this last case that the jurisdiction of the Court to punish for such contempt exists even during the lifetime of the father of the infant.

No. 5. — **Rex v. De Manneville**, 5 East, 221. — Rule.

No. 5. — **REX v. DE MANNEVILLE.**

(K. B. 1804.)

No. 6. — **REG. v. NASH. IN RE CAREY.**

(C. A. 1883.)

RULE.

THE custody of a legitimate child belongs to the father ;
of an illegitimate child, to the mother.

Rex v. De Manneville.

5 East, 221-224 (s. c. 1 Smith, 358 ; 7 R. R. 693).

Custody of Infant. — Right of Father at Common Law.

[221] The father of a child is (by the common law) entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom ; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an English-woman, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension.

At the beginning of this term a writ of *habeas corpus* was obtained, directed to the defendant, to bring up the body of an infant of eight months old, the defendant's daughter, upon an affidavit from the mother and her friends that the defendant, who was a Frenchman, had married the mother of the child, an English-woman, by whom he had this only child. That she not long after their marriage had separated herself from him, on account, as she alleged, of ill treatment, and kept the child, whom she was nursing, with her. That on the night of the tenth of April last the defendant found means, by force and stratagem, to get into the house where she was, and had forcibly taken the child, then at the breast, and carried it away almost naked in an open carriage in inclement weather, with a view, as the mother apprehended, of taking it out of the kingdom. However, when this part of the affidavit was afterwards more particularly referred to, it appeared that the only ground for such apprehension of the mother was, that the defendant had threatened to carry away the mother to a

No. 5. — *Rex v. De Manneville*, 5 East, 221-223.

distance from her friends, and afterwards had threatened to take away the child from her, and she was apprehensive that he meant to carry it to some remote part of the kingdom, or to France.

Topping now (after the return read, and the child being ready to be produced in Court when called for) said, that he had affidavits in answer which he would waive reading, if not necessary to prevent widening the breach between *the [* 222] parents. But he contended that the father was by law entitled to the custody of his child; and that the only ground upon which the Court had granted the writ, namely, on the supposition that the father had threatened, or had otherwise given reason to believe that he meant to send the child out of the kingdom, was removed upon referring more accurately to the terms in which that part of the mother's affidavit was sworn. And he referred to the case of *Mr. Lytton*, which came before this Court on an application for a *habeas corpus*, in 1781, by the mother to bring up the body of a child who had been placed at school, from whence it had been taken by the father. In that case there had been articles of separation, by which the father had bound himself to let the mother have access to the child. And there Lord MANSFIELD said that the Court could not at any age take a child from the father. But that as he had constrained himself by the articles to let the mother have access to the child, if he chose to take the child home, he must provide for the access of the mother to it there.

Lord ELLENBOROUGH, Ch. J., observed, that as the ground of removal out of the kingdom was done away, it lay on those who applied for the writ to show that the father was not entitled to the custody of the child.

Erskine, Garrow, and Gibbs then suggested that the father was now an alien enemy, and therefore the apprehension of the mother that he might carry the child out of the kingdom was not unreasonable, especially as he was liable himself to be sent out of the kingdom, under the Alien Act, at a moment's warning. That the child, *being born of an English mother here, was [* 223] entitled to the protection of the laws, and ought not to be exposed to the smallest risk of being removed. That it is of very tender age, and considering that its removal from the mother deprived it of its accustomed proper nutriment, was an additional reason for restoring it to her possession, particularly when the

 No. 6. — Reg. v. Nash, 10 Q. B. D. 454.

father had obtained possession of it by force and stratagem, and in a manner so dangerous to it.

LORD ELLENBOROUGH, Ch. J. (stopping Topping, who wished to have his affidavits upon the merits read). — We draw no inferences to the disadvantage of the father. But he is the person entitled by law to the custody of his child. If he abuse that right to the detriment of the child, the Court will protect the child. But there is no pretence that the child has been injured for want of nurture, or in any other respect. Then he, having a legal right to the custody of his child, and not having abused that right, is entitled to have it restored to him.

LAWRENCE, J. — Since *Mr. Lytton's* case, there was another of the same sort upon an application of Sir W. Murray, to obtain possession of a child five years old, which the mother kept from him. Lord KENYON had no doubt that the father was entitled to have the custody of the infant, unless the Court saw reason to believe that he intended to abuse his right by sacrificing the child, which was suggested to be his motive for getting possession of it. In that case Sir W. Murray had been divorced from the mother, and there was not, as it was alleged, any reason to think [* 224] the child his, though born before the * divorce. But the Court did not think that a sufficient ground to deny him the custody of it.

PER CURIAM,

Let the child be remanded to the custody of the father.

Reg. v. Nash, In re Carey, an infant.

10 Q. B. D. 454-456 (s. c. 52 L. J. Q. B. 442; 48 L. T. 447).

Infant. — Right of Custody of Illegitimate Child.

[454] A woman placed her illegitimate female child soon after its birth with N. and wife, who were labouring people, intending to pay them for it. She fell into ill health and was unable to continue her payments; but N. and wife continued to maintain the child till it was nearly seven years old. The mother then applied to have the child delivered to her, which N. and wife refused. She therefore applied for a *habeas corpus*, which was refused by NORTH, J., but granted by a divisional Court. N. and wife appealed. The mother, who was a kept mistress, did not propose that the child should live with her, but with a respectable married sister whose husband was in a station superior to that of N.

No. 6. — Reg. v. Nash, 10 Q. B. D. 454, 455.

Held, that the appeal must be dismissed, for that the mother of an illegitimate infant has a natural right to its custody, which will be regarded by the Court.

Rose Carey, a girl not quite fifteen years of age, was seduced in 1875, and was shortly afterwards turned out of her father's house. She was delivered of a female child on the 14th of May, 1876. Shortly after the infant's birth the mother placed it in the custody of Emma Nash, the wife of William Nash, a labouring man. She then obtained a situation, but fell into ill health and went into an infirmary. She made some payments to Nash and wife for the child, but was unable to continue them. After leaving the infirmary she became kept mistress to a gentleman. The child continued with the Nashes up to the present time. The mother had in 1880 summoned Nash before the justices of the peace under 24 & 25 Vict., c. 100, for unlawfully detaining the child; but the summons was dismissed. In December, 1882, she applied for a *habeas corpus* to bring up the child that it might be delivered to her, but the application was refused by Mr. Justice NORTH. The mother then appealed to a divisional Court, and on the 5th of February, 1883, the Court (POLLOCK, B., and MANISTY, J.) reversed the decision, and ordered that the *habeas corpus* should issue. Nash and wife appealed.

It was proposed by the mother that the child should not live with her, but with a sister of hers, who was the wife of Henry Wright, a clerk in the employment of The Press Association, * Limited, and had one child three years old. Wright [* 455] deposed that he was willing to take the guardianship of the infant and bring her up with his own child.

Fraser for the appellants. — This case is similar to *Re White*, 10 L. T. (O. S.) 349, where, under very similar circumstances, the Court refused to give an illegitimate child of eight years old into the mother's custody, the child being well taken care of and wishing to stay where she was. Simpson on Infants, p. 127. The Court will, if necessary, see the child and ascertain its wishes.

[JESSEL, M. R. — I have never consulted so young a child, and it has not been the practice of Courts of equity to do so.]

The Court will have regard to the advantage of the child: *Andrews v. Salt*, L. R. 8 Ch. 622; and the character of the mother is such that it cannot be for the child's benefit that it should be given up to her.

[JESSEL, M. R., referred to the observations of MAULE, J., in *Re Floyd*, 3 M. & G. 547.]

Reed, *contra*, was not called upon.

JESSEL, M. R. — I am of opinion that the order appealed from is clearly right. An unfortunate girl was seduced under the age of fifteen, and had a child. Her father turned her out of doors. She placed the child with two poor people, whom she intended to pay for maintaining it. She paid something, having got a situation. Her health failed, and she could not continue her payments. She was obliged to go into an infirmary, and on coming out fell in with a gentleman, with whom she lives as a kept mistress. She is therefore leading an immoral life. She wishes to have the child, and the nurse wishes to keep it. The appellants have not a particle of right to the custody of the child, and they set up the case that the child's natural mother is no relation to it, and has no more claim to its custody than any stranger. In a reported case MAULE, J., a very eminent Judge, is said to have asked whether the mother of an illegitimate child was anything but a stranger to it. I am disposed

to think that this was said ironically; but if not, the Judge [* 456] in making the observation must have been *referring only to the strict legal rights as to guardianship. In many cases the law recognises the right of a mother to the custody of her illegitimate child. In the case of *Ex parte Knee*, 1 Bos. & P. (N. R.) 148 (8 R. R. 772), before Sir JAMES MANSFIELD, it was held that she had such a right, unless ground was shown for displacing it. The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. There is in such a case a sort of blood relationship, which, though not legal, gives the natural relations a right to the custody of the child. Here the mother does not wish the child to be with her, but to be placed with her sister, a respectable married woman with one child; the husband is a clerk in the employ of the Press Association, and is therefore in a station superior to that of the appellants; and how it can be contended that it is for the benefit of the child to remain with the appellants, I do not see.

LINDLEY, L. J. — I am of the same opinion. We cannot interfere with the right of the mother in favour of persons who are mere strangers. There is indeed no legal relationship, but there is

a natural one, and the affection of the mother for the child must be taken into account in considering what is for the benefit of the child. The right of the mother as against the appellants is to my mind clear.

BOWEN, L. J. — I believe that the appellants are acting with a view to the benefit of the child, but philanthropy sometimes makes mistakes. The question is whether, in considering what is for the benefit of the child, the Court will have regard to natural relationship. When we consider what is for the child's benefit, the scale is turned by the respectability of the persons with whom she is to be placed.

Appeal dismissed.

ENGLISH NOTES.

It is to be noted that the common-law rights of the father of a legitimate child have been very much modified by statutes of recent years, which are more particularly referred to in the notes to *In re Agar-Ellis*, *Agar-Ellis v. Lascelles*, No. 7, p. 30, *post*. The first of these was passed in 1839 (2 & 3 Vict., c. 54), an early fruit of the gentler manners inaugurated by the reign of the Queen. It empowered the LORD CHANCELLOR and MASTER OF THE ROLLS to make orders giving the mother (who has not been convicted of adultery in a crim. con. suit) access to her children; and in the case of infants under the age of seven years, for delivering them over to her custody. This Act has, as will be seen in the next note, been superseded by Acts having a larger scope; but the common-law rule still remains, as constituting the *primâ facie* right, which can only be overridden by exercising the powers of the Acts, or by showing such exceptional circumstances as are mentioned in the next rule. As to the right of custody of an illegitimate child, there appears nothing to add to the weighty judgment of the MASTER OF THE ROLLS in the principal case of *Reg. v. Nash* (No. 6), above set forth.

AMERICAN NOTES.

At common law the father has the paramount right to the custody of his legitimate child. *People v. Mercein*, 3 Hill (New York), 399; 38 Am. Dec. 644. It would be superfluous to accumulate authorities to this elementary proposition. But consult *Matter of Scarritt*, 76 Missouri, 565; 43 Am. Rep. 768, citing *Rex v. Manneville*; *Rust v. Vanvacter*, 9 West Virginia, 600; *Com. v. Briggs*, 16 Pickering (Mass.), 203; *State v. Richardson*, 40 New Hampshire, 272; *Baird v. Baird*, 18 New Jersey Equity, 195; *State v. Paine*, 4 Humphreys (Tennessee), 523; *Latham v. Ellis*, 116 North Carolina, 30; *Johnson v. Terry*, 34 Connecticut, 263; *Miller v. Wallace*, 76 Georgia, 479; 2 Am. St. Rep. 48;

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Brooke v. Logan, 112 Indiana, 183; 2 Am. St. Rep. 177, and valuable note, p. 183.

The mother is the natural guardian of an illegitimate child, bound to support it, and entitled to its custody as against the father. *Robalina v. Armstrong*, 15 Barbour (New York Sup. Ct.), 247; *Wright v. Wright*, 2 Massachusetts, 109; *Marshall v. Reams*, 32 Florida, 499; 37 Am. St. Rep. 118, citing *Reg. v. Nash*, and *Queen v. Barnardo* [1891], 1 Q. B. Div. 194; *Wright v. Bennett*, 7 Illinois, 587; *Copeland v. State*, 60 Indiana, 394; *State v. Stigall*, 22 New Jersey Law, 286.

But her right as against the putative father is to be regarded no further than is consistent with the best interests of the child. *Robalina v. Armstrong*, *supra*; *State v. Noble*, 70 Iowa, 174; *Matter of Nofsinger*, 25 Missouri Appeals, 116; *In re Hope* (Rhode Island), 34 Atlantic Reporter, 994.

No. 7. — *IN RE AGAR-ELLIS, AGAR-ELLIS v. LASCELLES.*

(C. A. 1883.)

RULE.

A FATHER has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years, even if they are wards of Court.

The grounds for the interference of the Court with the paternal authority are:—

1. That the father has forfeited his rights by gross moral turpitude;
2. That he has by his conduct abdicated his paternal authority; or,
3. He seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court.

In re Agar-Ellis, Agar-Ellis v. Lascelles.

24 Ch. D. 317–339 (s. c. 53 L. J. Ch. 10; 50 L. T. 161).

[317] *Ward of Court. — Infant above the Age of Sixteen. — Years of Discretion. — Paternal Authority. — Free Access to and by Mother restricted. — Jurisdiction of Court. — 12 Car. II., c. 24 [Revised ed. Statutes, vol. i., p. 725].*

A father has a legal right to control and direct the education and bringing up of his children until they attain the age of twenty-one years, even although

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they are wards of Court, and the Court will not interfere with him in the exercise of his paternal authority, except (1) where by his gross moral turpitude he forfeits his rights, or, (2) where he has by his conduct abdicated his paternal authority, or (3) where he seeks to remove his children, being wards of Court, out of the jurisdiction without the consent of the Court.

A father put restrictions on the intercourse between his daughter in her seventeenth year, who was a ward of Court, and her mother, on the plea that he believed the mother would alienate the daughter's affections from him. The Court refused to interfere.

This was an appeal from a decision of PEARSON, J., dismissing a petition by an infant, who was a ward of Court, and her mother, under these circumstances.

The Hon. Leopold Agar-Ellis, a Protestant, married the Hon. Harriet Stonor, a Roman Catholic, in February, in 1864. There were four children of the marriage, the eldest of whom, a boy, died in 1872.

At the time of the marriage Mr. Agar-Ellis promised his wife that all the children of the marriage should be brought up as Roman Catholics; but soon after the birth of the first child he determined that they should be brought up as Protestants, to which determination he adhered. Mrs. Agar-Ellis, however, unknown to her husband, and in spite of his express directions, so indoctrinated the three remaining children with Roman Catholic views that ultimately, in 1878, when they were nine, eleven, and twelve years of age, respectively, they refused to go with their father to a Protestant place of worship. He thereupon, in June, 1878, instituted this action to make his children wards of Court, and took out a summons for directions as to their

* education. The mother then presented a petition with a [*318] view to their being brought up as Roman Catholics. The summons and petition were heard together before the late Vice-Chancellor MALINS and by the Court of Appeal, and in the result the Court of Appeal restrained the mother from taking the children to confession or to Roman Catholic places of worship without the consent of the father; but, striking out a declaration that the children ought to be brought up as members of the Church of England, left it to the father to do what he thought best for the temporal and spiritual welfare of the children. The case is fully reported on this point (10 Ch. D. 49).

Consequent on this decision, Mr. Agar-Ellis removed his children from the care of their mother, and placed them with clergy-

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men and other persons, allowing the mother to visit them only once a month, and requiring that all correspondence between the mother and the children should pass through his hands, or be subject to his supervision.

In January, 1883, the second daughter, Miss Harriet Agar-Ellis, attained sixteen years of age, and soon afterwards she addressed a letter to Mr. Justice FRY, to whose Court these proceedings were then attached, begging to be allowed the free exercise of her religion, and to be permitted to live with her mother. His Lordship directed his chief clerk to see the solicitors of Mr. and Mrs. Agar-Ellis with a view to some amicable arrangement being made, and ultimately Mr. Agar-Ellis made proposals under which Miss Harriet Agar-Ellis was to be allowed, subject to his control, to practise the Roman Catholic religion, to attend service at the Roman Catholic church on Sundays and festivals, and to prepare herself for her first communion.

At this time Miss Harriet Agar-Ellis was residing with a Madame Guerini at Brighton, with whom she had been placed by her father. This lady, being about to pay a visit of several weeks to her friends abroad, was unable to take Miss Agar-Ellis with her, and thereupon the latter, on the 2nd of June, wrote the following letter to Mr. Hastings, the senior member of the firm of solicitors acting for her mother: —

“DEAR MR. HASTINGS, — I write again to ask you to [* 319] apply to the *Judge for leave that I may spend my vacation with my mother, as you know for this last two years I have been moved about from place to place, and have only had part of one vacation with my mother, which the Judge ordered. The people I am with now are very kind to me, but they want to go abroad in July, and are unable to take me with them. Father has no place to take me to, and, with one exception, has never spent a vacation with us over four years. I am always amongst strangers. I am longing to see some of my relations. I know you will do what you can for me.

“Yours very truly,

“HARRIET AGAR-ELLIS.”

Under these circumstances a petition was presented by Mrs. Agar-Ellis and her daughter, by the Hon. Catharine F. Stonor,

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as their next friend, praying that Miss Harriet Agar-Ellis might be allowed to visit and spend her next vacation of two months with her mother; and that for the future the mother might be allowed free access to and to visit her said daughter, and that they might be allowed freely to communicate with one another by letter or otherwise.

This petition was strongly opposed by the father on the ground that to allow unrestricted communication between the mother and daughter, either by letter or personally, for so long a period as two months would tend to create a great prejudice in the child's mind against him, and might result in entirely alienating her affection from him.

On the 3rd of July the petition was heard in private by Mr. Justice PEARSON, and dismissed by him on the ground that, in the absence of any suggested fault on the part of the father, the Court had no jurisdiction to interfere with the legal right of the father to control the custody and education of his children, and to decide upon where they should reside.

Against this decision the petitioners appealed.

Higgins, Q. C., and Ingle Joyce for the appellants:—

Mr. Justice PEARSON considered that the legal right of the father could not be interfered with; that the case was concluded by the decision of the Court of Appeal (10 Ch. D. 49); and that the fact *that the infant had attained sixteen [* 320] made no difference. The ward is now a Roman Catholic, and attends Roman Catholic places of worship with the assent of the father, who has given up that question. The mother, against whom there is no imputation except that she is a Roman Catholic, now wishes more frequent and less restricted intercourse with her daughter. She is not allowed to communicate with her by letter without her letters being read by third parties, and is, in fact, reduced to post-cards. We contend that the language of the Court of Appeal on which Mr. Justice PEARSON relied ceased to be applicable when the ward attained sixteen. We say, first, that after sixteen the infant can reside where she pleases, and that her father has no legal right to her custody against her will; secondly, that the Court will only consider what is good for the infant, and will not regard it as good for her that the natural tie with her mother should be broken; and, thirdly, that whatever the legal rights of the father may be, the Court will have regard

to any conduct on the part of the father which makes it unreasonable for him to resume the exercise of them.

As to the first point, we say that after the infant has attained sixteen the father has no such legal right as he claims. In *Rex v. Greenhill*, 4 Ad. & E. 624, the principle is laid down that when the infant is of an age to exercise choice the Court will allow him to determine where he will go. *Reg. v. Clarke*, 7 E. & B. 186, lays down the same rule. In *In re Shanahan*, 20 L. T. 183, a *habeas corpus* to remove a boy of fourteen from a Protestant institution was refused to the father, the boy wishing to remain where he was. In *Reg. v. Howes*, 3 E. & E. 332, 337, it was laid down that sixteen is the age up to which the father of a female child has a legal right to her custody.

[COTTON, L. J., referred to the observations (on p. 48, *post*) as to custody up to twenty-one.]

In *re Connor*, 16 Ir. C. L. Rep. 112, the Court recognised the right of a boy of fourteen to choose his place of residence.

[BRETT, M. R. — The cases to which you refer relate to enabling a father to get possession of a child who is not in his [* 321] * custody. You are asking us to interfere with a father who has the custody.]

Our first step is, that on the above authorities, if the child were away from the father, he could not get a *habeas corpus* to have her delivered to him against her will. When the infant is come to years of discretion the Court will only free it from illegal restraint without handing it over to anybody. In *re Andrews*, L. R. 8 Q. B. 153, 158. In *Mallinson v. Mallinson*, L. R. 1 P. & D. 221, the order for custody was confined to the age of sixteen. In *Ryder v. Ryder*, 2 Sw. & Tr. 225, it was held that under sect. 35 of the Divorce Act there was no jurisdiction after sixteen.

[BRETT, M. R. — You cite no case, and I must therefore presume that there is none, in which the Court, except in cases of misconduct of the father, has taken an infant from him.]

No; but the cases lay down clearly that the Court will allow an infant of sixteen to go where it pleases, and that must be on the ground that the father has not a legal right to the custody, or only a right which the Court is at liberty to disregard.

[BOWEN, L. J. — According to your argument, a young lady of sixteen who was stopped by her father from going to Gretna Green might bring an action for false imprisonment.]

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Then as to the second and third points, the Court will only regard what is for the infant's benefit, and will give effect to any abandonment of the father's rights. *In re Andrews; Andrews v. Salt*, L. R. 8 Ch. 622; *Hill v. Hill*, 10 W. R. 400; *Lyons v. Blenkin*, Jac. 245 (23 R. R. 38); *Re Esther Lyons*, 22 L. T. (N. S.) 770, a very strong case. The Court has a discretion. *Stourton v. Stourton*, 8 D., M. & G. 760; *Andrews v. Salt*.

[COTTON, L. J. — It does not seem to me that the rights of a testamentary guardian are as extensive as those of the father.]

In *Johnstone v. Beattie*, 10 Cl. & F. 42, 85, they appear to be treated as standing on the same footing. Mrs. Agar-Ellis here only makes a very moderate request; she does not ask that the daughter may live * with her, but only that she may [* 322] spend two months' holiday with her mother; that the mother may be at liberty to visit her; and that the letters passing between them may not be read by third parties.

[BRETT, M. R. — Is there any authority for interfering against the father even after the age of sixteen, except in cases of his misconduct?]

Ex parte Hopkins, 3 P. Wms. 151.

[BRETT, M. R. — That was only refusing to make an order in favour of the father.]

Wellesley v. Wellesley, 2 Bli. (N. S.) 124; *Lyons v. Blenkin*, Jac. 245, 253, 262 (23 R. R. 38), recognises the right of the Court to interfere with a father "if acting in a manner in which he should not;" *Re Plomley*, 47 L. T. (N. S.) 283.

[COTTON, L. J. — That was a case of a father altering his son's course of life in a way which his own previous conduct made unreasonable.]

Creuze v. Hunter, 2 Cox, 242 (2 R. R. 38), is also in our favour.

[BRETT, M. R. — That was evidently a case of misconduct.]

It shows that when the child is a ward the Court will prevent the father from acting to its prejudice. The Court has been in the habit of exercising a wide discretion as to access. Seton on Decrees, 4th ed., p. 748; *De Mannerville v. De Mannerville*, 10 Ves. 52, 65 (7 R. R. 340). The Court may interfere with the right of the father though he has not been guilty of misconduct. *Talbot v. Earl of Shrewsbury*, 4 My. & Cr. 672; *In re Taylor*, 4 Ch. D. 157.

[BRETT, M. R. — None of the cases referred to appear to me to conflict with the rule laid down by Vice-Chancellor BACON in *Re Plomley*. The Court cannot depart from the rules which have been settled as to the exercise of its jurisdiction.]

Davey, Q. C., and G. Curtis Price for the respondent: —

Mr. Agar-Ellis, rightly or wrongly, considers that he [* 323] has good *reason to believe that his wife is trying to prejudice his children against him. He therefore is determined not to make any concessions in the way of allowing more unrestricted intercourse. If the principles laid down by the appellants were to be adopted by the Court, they would produce a revolution in the relations of father and child. Most of the cases that have been cited are decisions at common law on writ of *habeas corpus*, and a good deal of the old law is now inapplicable because of the 10th sub-section of the 25th section of the Judicature Act, 1873; in all cases relating to infants the rules of equity are now to prevail.

[BRETT, M. R. — We do not agree that the law is altered. We think that Courts of law and equity administered the law alike in proceedings under writs of *habeas corpus*.]

Then the question is reduced to this, whether the Court will interfere with a father who has the custody of his children, and who is maintaining them in pursuance of a legal and moral obligation. We contend that the Court will not interfere except in three classes of cases. First, where the moral turpitude of the father is so gross, either by reason of his immorality or excessive cruelty, that the Court will not allow him to retain the custody of his children: *Wellesley v. Duke of Beaufort*, 2 Russ. 1, is the leading case on this point; secondly, where, as in *Lyons v. Blenkin*, Jac. 245 (23 R. R. 38), the father has abdicated his parental authority in such a way that the Court will not allow him to interfere and resume it; thirdly, where the Court, in the exercise of its peculiar jurisdiction, will not permit its ward to be removed, even by the father, out of its jurisdiction without its consent. *Rochford v. Hackman*, Kay, 308, and *Re Plomley*, 47 L. T. (N. S.) 283, are instances of this rule. If Mr. Agar-Ellis is not allowed to bring up his children in the way that he deems best, he desires to intimate most respectfully to the Court that he will consider himself discharged from all legal or moral obligation to maintain his daughters. There is only a small fund in Court, and no

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offer of any kind has been made by the other side to maintain them.

[They were then stopped.]

* Higgins in reply :— [* 324]

The Court will now, in every case, consider what is for the benefit of its ward. We ask the Court to see the young lady.

[Their Lordships dissented from the proposal.]

Then if the father will really withdraw his maintenance, the mother is now in a position to maintain them, and will undertake to do so.

BRETT, M. R. :—

In this case the husband and wife are of different religious persuasions. The father is a Protestant and the mother is a Roman Catholic. They have children : among others, the daughter who is in question in this case. After many and bitter controversies with regard to the education of the children, as to which religious persuasion they should be brought up in, — at all events, after strong expressions of the feelings of this child, — the father consented that the child should follow the religious doctrine of her mother, and of which she so approved. But the father, insisting upon his right, did not allow this daughter to live with her mother, and has put her into many and various places to live. At last he has put her to live under the protection of a lady who is called Madame Guerini. This lady is about to proceed abroad for a few weeks, probably for the purpose of seeing her own relatives and friends. Of course she cannot take this young lady with her ; and thereupon the mother and the daughter, after requesting that this young lady, who is nearly seventeen, might for those few months live with her mother — not always, but for those few weeks of this year, and stay with her mother until the return of this Madame Guerini to England, and, after having been refused, have petitioned this Court, asking this Court to make an order that this young lady shall be allowed, notwithstanding her father's objection, to stay with her mother for some weeks, to be named by the Court, during the absence of this other lady ; and they have stated as facts that the father, although he has not forbidden correspondence between the mother and daughter, has insisted that every letter written by the daughter should be shown to a person nominated by him ; and that every letter

[* 325] * received from the mother by her daughter should be read by the person nominated by him — such person being no relation either to the mother or the daughter; and they have asked for an order that free access may be had between the mother and the daughter; and that the correspondence may be free — the meaning of those two applications being that, whereas the father has allowed the mother to see the daughter once a month while the girl was younger, the girl and her mother now wish to see each other whenever they please, not at the mother's house, but at the place where the father has appointed the child to live. That has been refused by the father, and they request the Court to make an order that they may have that freedom of access, and they have petitioned the Court that their correspondence may be free and not subject to that strange control put upon it by the father.

It was proposed by the Court yesterday that the Court should not interfere with the visit to the mother, but that the father should allow, not access whenever the daughter and the mother wished it, but once a fortnight instead of once a month, and that the correspondence between the mother and the daughter should not be subject to this supervision. But both these modifications are refused by the father. He refuses, therefore, to allow his daughter to pay a visit to her mother; he refuses to allow his daughter to see her mother more than once a month; he refuses to allow his daughter and her mother to correspond, except upon the condition that the letters are shown to himself or third parties. And we are told that this is done for fear that the affection of his daughter towards him should be altered. However, the petition is brought before the Court, and it has been argued on behalf of the mother and daughter that because the daughter is now more than sixteen, the father has no right to the control or custody over her; that she is emancipated from his control; and that the Court ought so to declare. In support of that argument it was said that the authorities show that where a girl over sixteen is absent from her father and with other people, the Court, upon a *habeas corpus* sued out by the father, will see the girl who is above sixteen and ascertain her view of the position, and if she is content to remain where she is, will not grant to the father upon the *habeas* [* 326] *corpus* a return of the child into his * custody. And it is said that that shows that the law is that when a girl is over sixteen her father has no longer any control over her. It was

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said further, that this was shown to be the law, because the Court in the case of a testamentary guardian will, if necessary, interfere with regard to his mode of exercising the control which is given to him by law. Now I cannot accede to the argument thus put forward. It seems to me to be directly contrary to the law of England, which is that the father has the control over the person, education, and conduct of his children until they are twenty-one years of age. That is the law. If a child is taken away from the father, or if a child leaves the father and is under the control of, or with other people, then the application for a *habeas corpus* is no part of the law of equity as distinguished from the common law of England. It is the universal law of England that if any one person alleges that another is under illegal control by anybody, that person, whoever it may be, may apply for a *habeas corpus*, and thereupon the person under whose supposed control or in whose custody the person is alleged to be illegally and without his consent is brought before the Court. But the question before the Court upon *habeas corpus* is whether the person is in illegal custody without that person's consent. Now, up to a certain age, children cannot consent or withhold consent. They can object or they can submit. But they cannot consent. Because the Court cannot inquire into every particular case, the law has now fixed upon certain ages — as to boys, the age of fourteen, and as to girls, the age of sixteen — up to which, as a general rule, the Court will not inquire upon a *habeas corpus*, as between the father and the child, as to the consent of the child to the place, wherever it may be. But above the age of fourteen in the case of a boy, and above the age of sixteen in the case of a girl, the Court will inquire whether the child consents to be where it is; and if the Court finds that the infant, no longer a child, but capable of consenting or not consenting, is consenting to the place where it is, then the very ground of an application for a *habeas corpus* falls away. I say, if it is the father who applies for the *habeas corpus* the *habeas corpus* is not granted. That seems to me to have been the rule, whether the *habeas corpus* was applied for to a Judge of the Court * of equity, or to a [* 327] Judge of a Court of common law. All Judges had the duty of listening to such applications; and, when they had such an application for a *habeas corpus*, to my mind it is clear that they administered the same law, and, therefore, I cannot assent to

the view which was suggested by Mr. Davey, that some alteration has been made by the Judicature Act in the rules to be observed upon an application for a *habeas corpus*. The law was administered in the same way by a chancery Judge as by a common-law Judge. Therefore, of course, the rules of equity, or the principles of equity, as they are called, are not to prevail, because there is nothing for them to prevail over. The cases of *habeas corpus*, therefore, do not at all apply to the proposition for which they were cited. In the present case they are, of course, inapplicable, because the child is not away from her father — the child is under the control of her father; and this application is not for a *habeas corpus* by the father to restore the child, but the application is for an order of the Court to be made against the father. Those cases, therefore, seem to have no application.

Now we have to deal with the cases of the testamentary guardian. It is impossible that a testamentary guardian can be the same as a father. A testamentary guardian is a creature of the law, and nature has nothing to do with it. But the law of England has recognised the natural rights of a father, not as guardian of his children, but as the father, because he is the father. The rights of a father as guardian, if they could be limited to his rights as guardian, would probably be the same as the rights of a testamentary guardian; but the father has greater rights than those which a testamentary guardian, or any other guardian, can have. A testamentary guardian is not called on to feel affection for his ward; he is not called upon to forgive the ward; he is not called upon to treat the ward with tenderness. The law recognises the rights of the father because it recognises the natural duties of the father. Now the natural duties of a father are to treat his child with the utmost affection and with infinite tenderness, to forgive his child without stint and under all circumstances. None of those duties are expected of a testamentary guardian, but they are the natural duties of a father,

which, if he breaks, he breaks from all that nature calls [* 328] upon him to do; and * if he breaks from these duties the law may not be able to insist upon their full performance.

The law cannot inquire in every case how fathers have fulfilled their duties. The law does not interfere because of the great trust and faith it has in the natural affection of the father to perform his duties, and therefore gives him corresponding rights. There-

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fore any decision on the question of a testamentary guardian cannot affect the question when it comes to be a question between the rights and duties of a father to his child. But there are limits to the forbearance and patience of the law in particular cases, which have been already referred to in argument. If, for instance, a father by his immoral conduct has become a person who really is unfit in the eyes of everybody to perform his duties to his child, and therefore to claim the rights of a father towards his child, the Court then will interfere. That is, if the child be a ward of Court; for unless the child be a ward of Court, the Court has no greater jurisdiction as between the father and child than it has between any other persons. But if the child be a ward of Court, and if the father has been guilty of that amount of immorality which convinces the Court that he is not fit to claim his rights as a father, the Court will, at the instance of the ward, interfere. And so, if the father has allowed certain things to be done, and then, out of mere caprice, has counter-ordered them, so as, in the eyes of everybody, to cause an injury to the child, then the Court will not allow the capricious change of mind, although if the thing had been done originally the Court could not have interfered. I am not prepared to say that the patience of the Court, in the case of its ward, might not be exhausted by other conduct of the father, — by cruelty to a great extent, or pitiless spitefulness to a great extent. I am not prepared to say the Court would not interfere in such a case, although no Court has yet decided it; but the Court could not interfere on such grounds as that except in the utmost need and in the most extreme case. I adopt, myself, the expression of the rule of the conduct of the Court as between father and child as laid down by Vice-Chancellor BACON in the case of *Re Plomley*, 47 L. T. (N. S.) 284. I do not mean to say it is not as strongly and clearly expressed in other cases, but that seems to * be one of the latest, and I cannot see that it is [*329] possible to lay down the rule more clearly. He says: "Appeals have been made to the principles of the law which have been settled for centuries. Those principles have never been called into question. One of those principles (and it is the prominent one) is that this Court, whatever be its authority or jurisdiction, has no right to interfere with the sacred right of a father over his own children." It seems to me that in that word "sacred" the VICE-CHANCELLOR has summed up all that I have

endeavoured to express. The rights of a testamentary guardian, or any other legal guardian, are legal rights. The rights of a father are sacred rights, because his duties are sacred duties. It seems to me that in this case there is no charge of immorality of conduct which can authorise the Court to interfere between this father and his child. There is no such change of mind before the Court at present as would authorise the Court to interfere on that ground. If it had been stated here, or if it had been shown, that any part of that which the father insists upon here was done for the purpose of exercising any further pressure upon his daughter as to her religion, I should have thought that that would have shown that capricious change of mind in this case which would have called upon the Court to interfere and to stop it forthwith. But it is not alleged in this petition that this strange insistence of the father for the purpose of preserving the affection of his child is done for the purpose of exercising any pressure as to her religion. It is not so stated, however strange it appears to me that the father, in this case, should have insisted on the things which I have mentioned. It is a matter which, judicially, the Court cannot further inquire into. The Court must act upon the general rule, and say that, on account of the general trust which the law reposes in the natural affection of a father, this case is not brought within any of the rules which authorise the Court to interfere; and, therefore, that this petition must be dismissed.

COTTON, L. J. :—

This is an appeal on a petition presented by an infant, one of the plaintiffs in the suit, and by the mother of that infant, asking that the infant may have a larger opportunity of seeing her [* 330] * mother, and may spend part of her holidays with her, and also asking for unrestricted means of communicating by letter. This petition is headed in the matter of the Act of 36 & 37 Vict., c. 12, and I mention that because it might be considered that the petition really did get some force, or the Court got some authority, from that Act; but it is admitted, and it is an undoubted fact, that the young lady is above the age of sixteen, and that Act, therefore, has no bearing at all upon the matter. The authority given to the Court of Chancery by that Act, merely relating to infants under sixteen, that Act must be dismissed altogether from consideration. Then we come to the question whether, independently of that Act, this Court will grant the prayer of the

petition. Now the first question which was raised is this: Does the fact that the young lady is above sixteen make any difference as regards the duty of the Court in interfering on her behalf? It was put by Mr. Higgins as high as this — that when an infant is over sixteen the father has no right to the custody of it. He did not deal, nor did Mr. Joyce, with the Act 12 Car. II., c. 24, which gives the father the power of appointing a testamentary guardian. Sect. 8 of that Act gives to fathers power by a will, or by a deed, to dispose of the custody and tuition of his child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time. That Act authorises the father to delegate to others the custody and tuition of his children until they are twenty-one. Nothing can, in my opinion, be a clearer declaration of the law that the father himself, when living, has the right to the custody and tuition of his children whilst they are under the age of twenty-one years. But certain cases were cited by Mr. Higgins in support of his contention. They were cases principally, if not entirely, of *habeas corpus*; but it is remarkable that in one of the cases to which he referred, *Reg. v. Howes*, although there is a passage in the judgment of Lord Chief Justice COCKBURN, on which he relied on another point, there is this passage also (3 E. & E. 336): “Now the cases which have been decided on this subject show that although a father is entitled to the custody of his children till they attain the age of twenty-one, this Court will not grant a *habeas corpus* to hand a child which is * below that age over to its father, provided it has attained [* 331] an age of sufficient discretion to enable it to exercise a wise choice for its own interests.” Therefore the LORD CHIEF JUSTICE there most distinctly recognises what, having regard to the Act, I should have thought was beyond dispute, that during infancy and over sixteen the right of the father still continues.

But then there are cases where, undoubtedly, the Court declined to interfere on *habeas corpus* in order to hand the child over to the father or to interfere with it when it was of the age of discretion, — the age of sixteen in the case of girls, and the age of fourteen in the case of boys. For what reason is that? When an infant is so young as not to be able in the eyes of the law to exercise a discretion, then, unless that infant is in the proper custody, that is to say, the legal custody of the father or the

guardian appointed, it is not in legal custody, and the very object of suing out a *habeas corpus* is to have it ascertained whether the person who is sought to be brought up is under duress or imprisonment; but nobody can be placed in the position of being under duress or imprisonment if he expresses a wish to remain where he is at the time the writ is issued, that is to say, provided the person is competent to express such a wish; and if he does, it is the duty of the law to regard it. When the child is so young as not to be able to express its wish, if it is not in that which is the legal custody, it must be considered as under duress or imprisonment and in illegal custody, and therefore the Court will grant a *habeas corpus* and have the child brought from the custody where it is, when it is not of an age to express a wish in such a way as that the law can attend to it. That, in my opinion, entirely displaces all those cases which have been referred to by Mr. Higgins as regards the refusal of the Court on a writ of *habeas corpus* to deliver over a child, when it has arrived at years of discretion, to its father.

Then what we have to consider is, whether the Court will interfere with the discretion of the father. Now, for my own part, I must express my regret that the suggestion thrown out by the Court yesterday was not acceded to by the father. I can hardly conceive circumstances where a daughter should not have the opportunity of visiting, under any restrictions which [* 332] * may be necessary, and of corresponding with her mother.

I should think that that would, almost as an unexceptional rule, be of the greatest possible advantage to the infant. But the father takes a different view of the case, and the question which we have to consider is whether the Court ought to interfere with the discretion of the father, and to say what it would think best for the infant. Here we are not in any way dealing with the jurisdiction of the Court under *habeas corpus*, — we are considering the jurisdiction which the Court of Chancery has always exercised, delegated probably from the Crown as *parens patriæ*. The Court does not exercise its jurisdiction except when either there is money paid into Court under the Trustee Relief Act, and for this purpose £100 is held sufficient, or a suit is instituted to administer the trusts of money settled on the infant, not because the jurisdiction does not exist, but because the Court will not interfere as regards the custody and tuition of the children, where it has not the means

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of providing for them. That is, the jurisdiction is not exercised unless the infant is made what is called a ward of Court, either by being party to an action to administer the trusts of money, or being interested in money paid into Court under the Trustee Relief Act. Here, in my opinion, the circumstances are not such as, having regard to the principles on which the Court has acted in exercising that jurisdiction, to justify the Court in interfering with the discretion of the father. I do not say that the Court has no jurisdiction. The Court has jurisdiction to consider whether the father has acted in such a way as will justify the Court in interfering with his paternal authority. It is a question whether, on the principles upon which the Court has always acted, and which have been laid down for centuries, the Court ought to exercise its jurisdiction by interfering with the discretion of the father. Some cases were referred to by Mr. Higgins as to testamentary guardians. In my opinion those cases have no bearing on the question which we have to consider. The testamentary guardian stands in an entirely different position. The right given to him is the right of tuition and custody under the Act of Parliament. It is given to him as a trust to be exercised, and the Court will interfere with his discretion in exercising that trust in a way in which it never will interfere with the discretion * of [* 333] a father. In this case, when it was before the Court on a former occasion, I find Lord Justice JAMES (10 Ch. D. 74), referring to the case of *Stourton v. Stourton*, says (8 D., M. & G. 760): "But that case was the case of a testamentary guardian, — a case of mere and pure trust, which is essentially under the jurisdiction of the Court, and under a jurisdiction always exercised with the widest judicial discretion." These cases, therefore, may be disregarded. Now what circumstances do justify the interference of the Court with the rights and duties of a father? In one way the Court does interfere, undoubtedly, whenever an infant is made a ward of Court; that is to say, it prevents the father (and that is an interference with some portion of his rights) from taking the infant out of the jurisdiction. The Court will not allow the father to withdraw the ward from the jurisdiction to prevent the Court from exercising jurisdiction, if the circumstances are such as to justify the Court in doing so. But that is a very different thing from interfering with the discretion of the father as regards the tuition and custody of the child within the jurisdiction, where

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the Court can ascertain whether it is exercised or not exercised in such a way as that the Court should interfere. I will not say there are no other cases than those I have mentioned, but those which have been brought before the Court are those where the father by his conduct has shown that he is entirely unfit in any respect to exercise his parental authority and duties as regards his children. Here there is nothing of the kind. There is another thing in this case which has been already dealt with by the Court before. The father, although not unfitted to discharge the duties of a father, may have acted in such a way as to preclude himself in a particular instance from insisting on rights he would otherwise have; as where a father has allowed, in consequence of money being left to a child, the child to live with a relative and be brought up in a way not suited to its former station in life or to the means of the father. There the Court says you have allowed that to be done, and to alter that would be such an injury to the child that you have precluded yourself from exercising your power as a father in that particular respect, and then the

Court interferes to prevent the father from having the custody of the child, not because he is immoral, or has * forfeited all his rights, but because in that particular instance he has so acted as to preclude himself from insisting on what otherwise would be his right. That was the case in *Lyons v. Blenkin*, Jac. 245 (23 R. R. 38), which has been cited. Then what else is there in the case? I quite agree with the MASTER OF THE ROLLS that I would in no way limit the hand of the Court, or say that where there are cases of cruelty to a child the Court would not interfere. But nothing of that sort, I think, can be successfully suggested in this case in such a way as to justify the Court in interfering in this case.

That being so, what is the result? It is not in our power to go into the question as to what we think is for the benefit of this ward. The father has not, in my opinion, forfeited his right to exercise his duties as a father, and we ought not to interfere. It has been said that we ought to consider the interest of the ward. Undoubtedly. But this Court holds this principle — that when, by birth, a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interest of the particular infant, that the Court should not, except in very extreme cases, interfere with the discretion of the

father, but leave to him the responsibility of exercising that power which nature has given him by the birth of the child. In my opinion, we should be breaking through the principle on which this Court has so long acted if we were to be persuaded by any argument addressed to us to interfere in this case and take upon ourselves the duties which the father has to exercise.

BOWEN, L. J. :—

In this case the infant, who is a girl over the age of sixteen, who is being maintained by her father, and is in the custody of her father, has, in conjunction with her mother, asked the Court to interfere with the directions which her father has given as to the place in which she should spend her vacation, and as to the mode in which her mother's access to her should be limited and confined. This is a case in which, if we were not in a Court of law, but in a court of critics, capable of being moved by

feelings of favour or disfavour, we might be tempted to [335] comment, with more or less severity, upon the way in which, so far as we have heard the story, the father has exercised his parental right. But it seems to me the Court must not allow itself to drift out of the proper course; the Court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except it be in those special cases in which the State is called upon, for reasons of urgency, to set aside the parental authority and to intervene for itself. I, for one, should deeply regret the day, if it ever came, when Courts of law or equity thought themselves justified in interfering more than is strictly necessary with the private affairs of the people of this country. Both as regards the conduct of private affairs and of domestic life, the rule is that Courts of law should not intervene except upon occasion. It is far better that people should be left free, and I do not believe that a Court of law can bring up a child as successfully as a father, even if the father was exercising his discretion as regards the child in a way which critics might condemn. Now a good deal of this discussion has turned upon the exact limits of parental authority. As far as one can see, some little confusion has been caused by the use in earlier law books of distinctions by which the law now no longer strictly stands. The strict common law gave to the father the guardianship of his children during the age of nurture and until the age of discretion. The limit was fixed at fourteen

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years in the case of a boy, and sixteen years in the case of a girl; but beyond this, except in the case of the heir apparent, if one is to take the strict terminology of the older law, the father had no actual guardianship except only in the case of the heir apparent, in which case he was guardian by nature till twenty-one. That was what was called guardianship by nature in strict law. But for a great number of years the term "guardian by nature" has not been confined, so far as the father is concerned, to the case of heirs apparent, but has been used, on the contrary, to denote that sort of guardianship which the ordinary law of nature intrusts to the father till the age of infancy has completely passed and gone.

I do not desire to elaborate the matter more than is [* 336] necessary. * The history, I think, of the term "natural guardianship" and of its extension, more especially in Courts of equity, to the father's natural custody and to the authority which a father has over his child, up to the complete age of twenty-one, will be found in Hargreave's note to Coke, Co. Lit. 88 b. There is, therefore, a natural paternal jurisdiction between the age of discretion and the age of twenty-one, which the law will recognise. It has not only been recognised by the common law and by the Court of Chancery, but it has also been recognised by statute. The Act of 12 Car. II. enables the father by his will to dispose of the custody and tuition of his child or children until they attain the age of twenty-one years. It seems to me to follow that if a father can dispose of the custody and tuition of his children by will until the age of twenty-one, it must be because the law recognises, to some extent, that he has himself an authority over the children till that age is reached. To neglect the natural jurisdiction of the father over the child until the age of twenty-one would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.

We have been pressed by Mr. Higgins with a certain class of cases in which, upon *habeas corpus*, the Courts refused, after the age of discretion had been reached, to restore to the father the child who had escaped beyond his control. In all those cases it was a question of restoring by force to the father the child who has escaped voluntarily and elected to remain beyond his custody. The reason why the Court in those cases refused to restore the child to the custody of the father has been pointed out to be that

the writ of *habeas corpus* is really a writ affecting the liberty of the person, and if the child is free he cannot, on such an application, be handed over to the custody of the applicant. The MASTER OF THE ROLLS has, I think, hit the exact distinction which applies to that class of authorities, and which will be found in a note to the case of *Ex parte Hopkins*, 3 P. Wms. 155. The annotator says: "If the parties brought up thereon will acquaint the Court that they are under no force, the Court will let them go back to the places from whence they came, or if they appear to be under restraint will set them at liberty, but not deliver them into the custody of * another, nor in a proceeding of [*337] that nature determine private rights, as the right of guardianship evidently is."

Now, with regard to the cases of testamentary guardians, which have also been pressed upon us, the distinction is equally obvious. The testamentary guardian is only entitled to exercise, by way of trust, control over the custody and tuition of the infant, and I agree in what has been said as to that by the other members of the Court. When we come to the case of wards and the special jurisdiction exercised by the Court of Chancery over infants who have been brought within its protection, as is the case with this particular young lady, it seems to me to be essential to remember that the Court, even in the case of its wards, will not disregard the usual course of nature. How can one imagine any opposite view being taken? Fancy the position of a child, with its father living, which the Court endeavours to bring up by judicial machinery, instead of leaving it to be brought up by parental care. Judicial machinery is quite inadequate to the task of educating children in this country. It can correct abuses and it can interfere to redress the parental caprice, and it does interfere when the natural guardian of the child ceases to be the natural guardian, and shows by his conduct that he has become an unnatural guardian; but to interfere further would be to ignore the one principle which is the most fundamental of all in the history of mankind, and owing to the full play of which man has become what he is.

Now the Court must never forget, and will never forget, first of all, the rights of family life, which are sacred. I think all that could be said on that subject has been said far better than I could repeat it by Vice-Chancellor KINDERSLEY in the case of *In re*

Curtis, 28 L. J. Ch. 458, and the cases to which he there refers. Those are as to the rights of family life. Then we must regard the benefit of the infant; but then it must be remembered that if the words "benefit of the infant" are used in any but the accurate sense it would be a fallacious test to apply to the way the Court exercises its jurisdiction over the infant by way of interference with the father. It is not the benefit to the infant as conceived

by the Court, but it must be the benefit to the infant [* 338] * having regard to the natural law which points out that

the father knows far better, as a rule, what is good for his children than a Court of justice can. Now above sixteen it appears to me, as below sixteen, the Court can only interfere with the father for a sufficient reason. When you come to a child above the age of sixteen the Court ought only to interfere with the father's discretion upon the same lines, so to speak, as it would interfere below sixteen. Of course there are exceptions, and circumstances differ. A child below sixteen requires very different treatment at home to a child above sixteen, and the conduct of a father, which might be tolerated in the case of the one, might be perfectly intolerable in the case of the other. But still the father has the natural authority. Except in cases of immorality, or where he is clearly not exercising a discretion at all, but a wicked or cruel caprice, or where he is endeavouring to withdraw from the protection of the Court, which is intrusted with such protection by law, the custody of the infant, as a rule, this Court does not and cannot interfere, because it cannot do so successfully, or, I should rather say, because it cannot do so with the certainty that its doing so would not be attended with far greater injury both to the infant itself and also to general social life. I believe that the Court has jurisdiction, but it must exercise it with sufficient reason. As the MASTER OF THE ROLLS said, the interference of the Court may be certainly invoked by reason of other circumstances than those which have been laid down in the classification to which he has alluded. As soon as it becomes obvious that the rights of the family are being abused to the detriment of the interests of the infant, then the father shows that he is no longer the natural guardian — that he has become an unnatural guardian — that he has perverted the ties of nature for the purpose of injustice and cruelty. When that case arrives the Court will not stay its hand; but until that case arrives it is not mere disagreement

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with the view taken by the father of his rights and the interests of his infant that can justify the Court in interfering. If that were not so we might be interfering all day and with every family. I have no doubt that there are very few families in the country in which fathers do not, at some time or other, make mistakes, and there are very few families in which a wiser * person than the father might not do something better for [* 339] that child than is being done by the father, who, however, has an authority which never ought to be slighted.

ENGLISH NOTES.

The almost irresponsible powers of the father, who has not been guilty of grossly immoral conduct, were to a certain extent (as above observed, p. 29, *ante*) interfered with by the Act 2 & 3 Vict., c. 54. This Act was subsequently replaced by 36 & 37 Vict., c. 12; the principal provision of which is again replaced and extended by the Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27), mentioned below. The Act of 36 & 37 Vict., c. 12, also contains a provision that an agreement in a separation deed shall not be held invalid by reason only of its providing that the father shall give up the custody or control of an infant to the mother; provided that no Court shall enforce the agreement against the benefit of the infant.

There are certain clauses of the Matrimonial Causes Acts, 1857 to 1878, which give powers to the Court having jurisdiction in the matrimonial cause to make suitable arrangements for the custody of and access to children, and for settlements of property. See in particular 20 & 21 Vict., c. 85, ss. 33, 35, 45; 22 & 23 Vict., c. 61, s. 4; and 41 & 42 Vict., c. 19, s. 4.

The Guardianship of Infants Act, 1886 (49 & 50 Vict., c. 27), contains important modifications of the powers of the father, and extension of the powers of the Court, with respect to guardianship.

By sect. 2: On the death of the father of an infant the mother, if surviving, shall be the guardian of the infant — either alone, if no guardian has been appointed by the father, or jointly with any guardian appointed by the father. If no guardian has been appointed by the father, the Court may appoint a guardian to act jointly with the mother.

By sect. 3: (1) The mother may by deed or will appoint a guardian or guardians after the death of the father; and where guardians are appointed by both parents, they shall act jointly. (2) The mother may by deed or will provisionally appoint a guardian or guardians to act after her death jointly with the father; and the Court, if it is

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shown to their satisfaction that the father is unfitted to be the sole guardian, may confirm the appointment, or make such other order in respect of the guardianship as they think fit.

By sect. 5: The Court may, upon the application of the mother, make such order as they think fit regarding the custody of and right of access to the infant, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes of the mother as well as of the father.

By sect. 7: Where a decree for judicial separation, or a decree either *nisi* or absolute for divorce, is pronounced, the Court may by the decree declare the guilty parent unfit to have the custody of the children; and in this case that parent shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship.

The Court has jurisdiction under this Act (as it had jurisdiction before) to remove a guardian although the infant is not a ward of Court and is not possessed of property. It is still the law that the wishes of the father must be regarded by the Court and be enforced, unless there is strong reason for disregarding them. But where it is shown that the father was indifferent as to what religion the children were brought up in; and where the mother, although the father was a Catholic, after his death, appointed under the Act of 1886 a Protestant guardian, under whose care they continued to be—as they were in the father's lifetime—brought up as Protestants, the Court refused, at the instance of a Catholic aunt, to remove the guardian or to appoint a joint guardian. *In re McGrath* (C. A. 1892), 1893, 1 Ch. 143, 62 L. J. Ch. 208, 67 L. T. 636, 41 W. R. 97.

Upon an application by writ of *habeas corpus* by the mother, who was the legal guardian, of a female infant, it appeared that the infant was born at Nice in August, 1878, both parents being Roman Catholics. The child was baptised and brought up in that faith. In 1879 the mother of the child was deserted by the father, who had since died. The mother subsequently went, in service as a lady's maid, to the United States, leaving the child at Nice in charge of an Italian woman and her husband. Subsequently the mother married again, and the infant was—to her great distress at the time—taken away from the Italian people to live with her mother and step-father. The step-father having died, the mother endeavoured to support herself and the child by dressmaking. In 1889 the girl being in failing health was taken into the convalescent home of the defendant (a Protestant) and subsequently into a Roman Catholic convalescent home. In 1890 she again went to the defendant's home, her expenses being paid by the Vicar of Hampstead; the mother only contributing

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some trifling sums to her expenses. It appeared that the girl, without other influence than the general atmosphere of the home, had imbibed Protestant views, and that if she was given back to the mother she would be handed over to the care of persons in a Roman Catholic charitable home. She was comfortable and happy in the home where she was, and much objected to being taken away. The Judges of the Divisional Court, who saw the girl, came to the conclusion that it would not be for her welfare to remove her; and they dismissed the application. On appeal from the order, the Court of Appeal, acting upon the principle of a decision of KNIGHT-BRUCE, V. C., in a case in the Court of Chancery, *In re Fynn* (1848), 2 De G. & Sm. 457, and of the decision in the case of *In re McGrath, supra*, dismissed the appeal. They considered that although the mother was not charged with any misconduct, the circumstances were such that the Court, acting for the benefit of the child, was obliged to supersede the natural rights of the mother. *Reg. v. Gyngall* (C. A. 1893), 1893, 2 Q. B. 232, 62 L. J. Q. B. 559, 69 L. T. 481.

A Roman Catholic father allowed his children, in conformity with their mother's wishes, to be brought up in the Protestant religion until a time when by reason of his intemperate habits they were taken from him and placed by the Court in the custody of a Protestant, who continued to bring them up in this way. Subsequently the father, having (as alleged) become reformed and devout, brought a summons to have the children removed to a suitable Roman Catholic school. The Court of Appeal, affirming the judgment of KEKEWICH, J., who had seen the children, now aged fifteen and eleven respectively, dismissed the summons on the ground that it was too late to change the religion of the elder girl against her will, and that it was for the benefit of the children that they should not be separated, and that the father, by his conduct in allowing the children to be brought up as they had been, had forfeited his right to have his wishes to change their religion regarded. *In re Newton* (C. A. 1896), 1896, 1 Ch. 740, 65 L. J. Ch. 641, 73 L. T. 692, 44 W. R. 470.

The jurisdiction of the Court to control the legal rights of a father over his children on the ground of grossly immoral conduct was fully established in the case of *Wellesley v. Duke of Beaufort* (1827), 2 Russ. 1 (affirmed in House of Lords, *s. n. Wellesley v. Wellesley*, 2 Bligh (N. S.), 124; 1 Dow & Cl. 152). It was there observed by Lord ELDON that the reason the Court does not act where there is no property, is not for want of jurisdiction, but for want of means, because the Court cannot take on itself the maintenance of all the children in the kingdom.

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AMERICAN NOTES.

There has been a constantly growing tendency in this country for many years to disregard the natural rights of parents, and to consider exclusively the interests of the child. No doubt the Courts here will deprive the parent of the custody if he or she is grossly immoral, but generally only in an action for divorce, or where the parent applies to regain its custody. The Pennsylvania Court has gone so far as to take the child from the father where he refused, although conscientiously, to provide it with suitable medical attendance, and subjected it to quack treatment. *Heineann's Appeal*, 96 Penn. State, 112; 42 Am. Rep. 532. By statute in Indiana, children may be taken by the State from the custody of parents whose course of life or evil conduct unfits them to rear children. *Van Walters v. Board of Children's Guardians*, 132 Indiana, 567; 18 Lawyers' Rep. Annotated, 431. And in Connecticut, when a child has been committed by parents to the care of the State, under the statute, its religious education may not be dictated or interfered with by the parents. *Whalen v. Olmstead*, 61 Connecticut, 263; 15 Lawyers' Rep. Annotated, 593. Similar statutes exist in Massachusetts and Wisconsin. See *Milwaukee Ind. School v. Milwaukee County Sup'rs*, 40 Wisconsin, 328; 22 Am. Rep. 702. In New Hampshire, where the father is unfit another guardian may be appointed in his place by statute, and the Court of Chancery has probably a like power. *Prime v. Foote*, 63 New Hampshire, 52.

That the interests of the child are paramount: *Case of Waldron*, 13 Johnson (New York), 418; *McKim v. McKim*, 12 Rhode Island, 462; 34 Am. Rep. 694; *Matter of Bort*, 25 Kansas, 308; 37 Am. Rep. 255; *Sturtevant v. State*, 15 Nebraska, 459; 48 Am. Rep. 349; *English v. English*, 32 New Jersey Equity, 738, and a valuable note by the reporter, citing the principal case; *State v. Libbey*, 44 New Hampshire, 321; 82 Am. Dec. 223; *Green v. Campbell*, 35 West Virginia, 698; 29 Am. St. Rep. 843; *Marshall v. Reams*, 32 Florida, 499; 37 Am. St. Rep. 118.

Where a child has been given up at birth to third persons, especially relatives, who have for a period of years supported it with the acquiescence of the parents, the Court may refuse in the interest of the child to award the custody to the parents. *Pool v. Gott*, 14 Law Reporter, 269; *Wilcox v. Wilcox*, 14 New York, 575; *Bently v. Terry*, 59 Georgia, 555; 27 Am. Rep. 399; *Chapsky v. Wood*, 26 Kansas, 650; 40 Am. Rep. 321 and note, 327; *Bonnett v. Bonnett*, 61 Iowa, 198; 47 Am. Rep. 810; *Matter of Scarritt*, 76 Missouri, 565; 43 Am. Rep. 768; *Jones v. Darnall*, 103 Indiana, 569; 53 Am. Rep. 545; *Merritt v. Swinley*, 82 Virginia, 433; 3 Am. St. Rep. 115; *Green v. Campbell*, *supra*; *Cunningham v. Barnes*, 37 West Virginia, 746; 38 Am. St. Rep. 57.

But the father cannot give away the child so as to bar the mother's right to its custody after its death, even where the custody had been changed for ten years, the child preferred to remain, and the mother was poor. *Moore v. Christian*, 56 Mississippi, 408; 31 Am. Rep. 375.

The case of *Clark v. Bayer*, 32 Ohio State, 299; 30 Am. Rep. 593, is a valuable one on these points. The Court observed: "In this country there is quite a uniformity in the decisions in relation to the rightful custody of

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infant children. The general spirit of modern adjudged cases on this subject, both in England and the States, does not essentially differ. As a general rule, the father is considered as being entitled to the custody of his minor children, and in case of his death or incapacity, the mother. In cases of controverted custody, the present and future interests of the minor control the judgment and direct the discretion of Courts. While the legal rights of parents are to be respected, the welfare of the minor is of paramount consideration. If necessary to attain that end, the custody of minor children will be taken from their parents or refused to them."

"When the question of custody arises between the father and mother, or between either of them and another, as to rightful custody, and the minor is of an age to make an intelligent and discreet choice, Courts will respect the minor's election. When the child is too young to exercise judgment in making a choice, Courts are never restrained by any supposed absolute right of custody in either parent, but will direct the custody where the best and highest interests of the infant will be subserved.

"It sometimes happens that parents have abandoned their minor children, or by act and word transferred their custody to another. In such cases, where the custodian is, in every way, a proper person to have the care, training, and education of the infant, and the Court is satisfied its social, moral, and educational interests will be best promoted by remaining in the custody of the person to whom it was transferred, or received, when abandoned, the new custody will be treated as lawful and exclusive.

"After the affections of both child and adopted parent become engaged, and a state of things has arisen which cannot be altered without risking the happiness of the child, and the father wants to reclaim it, the better opinion is that he is not in a position to have the interference of a Court in his favor. His parental rights must yield to the feelings, interests, and rights of other parties acquired with his consent."

"From authority and reason, the following propositions may be stated generally : —

"1. As a general rule the parents are entitled to the custody of their minor children. When the parents are living apart, the father is, *primâ facie*, entitled to that custody, and where he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons, except that of the mother in cases where the infant child is of such tender years as to require her present care; but in all cases of controverted right to custody the welfare of the minor is first to be considered.

"2. The father's right is not, however, absolute under all circumstances. He may relinquish it by contract, forfeit it by abandonment, lose it by being in a condition of total inability to afford his minor children necessary care and support.

"Where a father and mother, living apart, by agreement transfer the care and custody of their infant children to the grandfather of the children, in consideration that he will receive, care, and provide for them, and in pursuance of such agreement he does take them in charge, the custody of the grandfather is lawful, and he has legal capacity to maintain an action for

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damages against one who wrongfully takes or causes them to be taken from his custody."

The extent to which the natural parental right to custody of the infant child is disregarded in favor of the child's interests is strongly illustrated in *Re D'Anna*, 117 North Carolina, 462, where it was held, in *habeas corpus* proceedings for the custody of a young child of divorced parents, both parents being of good character and of ability to support and educate the child, but the mother having remarried, and the new husband being of dissipated and vicious habits, that it was proper to award the custody to the father. The Court said this "may appear to make of the mother a vicarious sufferer for the sins of another, but its foundation is the law of the land, which, as well as the moral law, oftentimes requires such offerings to be made."

INJUNCTION.

See also Nos. 4 and 5 of "ANCIENT LIGHT," and notes, 3 R. C. 48 *et seq.*; Nos. 63 and 64 of "CONTRACT," and notes, 6 R. C. 647 *et seq.*; No. 21 of "EASEMENT," 10 R. C. 307 *et seq.*

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(C. A. 1889.)

No. 2. — SHELFER v. CITY OF LONDON ELECTRIC LIGHTING COMPANY.

MEUX'S BREWERY COMPANY v. CITY OF LONDON ELECTRIC LIGHTING COMPANY.

(C. A. 1894.)

RULE.

LORD CAIRNS' Act (21 & 22 Vict., c. 27), enabling the Court of Chancery to award damages in lieu of an injunction, has no application in *quia timet* actions.

The jurisdiction given by Lord Cairns' Act has not altered the settled rules upon which the Court has interfered by injunction; nor is it limited to cases where a mandatory injunction is claimed; but it extends to all cases in

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which an injunction is sought to prevent the continuance of a tortious act.

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43 Ch. D. 316-342 (s. c. 62 L. T. 518).

Jurisdiction. — Damages in Substitution for Injunction. [316]

Lord Cairns' Act did not confer upon the Court of Chancery any jurisdiction to award damages in a case where no wrongful act had been committed by the person against whom an injunction was sought. Therefore where an action is brought for an injunction in respect of a threatened injury, and no actual wrong has been committed by the defendant, the Court has no jurisdiction to give damages in substitution for such injunction.

The plaintiffs brought an action against the defendants for delivery to the plaintiffs of certain cargoes then at sea, to which they claimed to be entitled, for an injunction to prevent the defendants from receiving them, and for damages for their detention. The defendants by their pleadings claimed the right to receive the cargoes, and showed that they intended to receive them. Shortly after the writ was issued an order was made by consent under which the defendants received the cargoes, keeping accounts, and abiding by any order of the Court as to the proceeds. At the time when this order was made, only two of the cargoes had arrived in this country. At the hearing the Judge held that the conduct of the defendants amounted to an unlawful detention of the cargoes, and gave judgment for the plaintiffs, with an inquiry what damages had been sustained by them by reason of the detention of the cargoes by the defendants. The defendants appealed against the whole of this judgment, but subsequently abandoned their appeal against the portion containing the inquiry, and claimed to be entitled to reimbursement for expenses incurred by them in respect of the cargoes received under the consent order. The appeal was dismissed, and the defendants appealed to the House of Lords, who varied the judgment by allowing the claim to expenses, but affirmed it in other respects. No application was made to the House to vary or alter the terms of the inquiry, which accordingly remained as part of the judgment. The Chief Clerk made a certificate finding damages on the footing that there had been a detention of all the cargoes, commencing on their arrival in this country. The defendants applied to vary the certificate, contending that the effect of the decision of the House of Lords was that there had been in fact no wrongful detention, and that nominal damages only ought to be given. KAY, J., refused to vary the certificate, and the defendants appealed.

Held, by COTTON and FRY, L. JJ., BOWEN, L. J., dissenting, that the inquiry * in effect affirmed that there had been a wrongful detention of the [*317] cargoes in question giving rise to damages; that such an inquiry could not be satisfied by finding merely nominal damages, nor was it competent to the Court in working out such an inquiry, not reversed by any Court, to deprive it of all force and effect by reviewing the circumstances under which it was made;

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that the decision of the House of Lords had left the inquiry in force, and that no reasonable ground had been shown for varying the certificate of the Chief Clerk.

Held, by BOWEN, L. J., that the effect of the decision of the House of Lords was that no act of possession under the consent order was wrongful, or gave any right to damages; that the Court had no jurisdiction to give damages in a case where a wrongful act had not been committed, but only threatened; that the Chief Clerk was not precluded by the terms of the inquiry from finding that there were nominal damages only; that as he had made no distinction between the cargoes, but had apparently proceeded upon the view that taking possession under the consent order was itself an act of detention from which damages would flow, his certificate was wrong; and that the matter ought to be referred back to him in order that he might state what were the wrongful act or acts of detention in respect of which he found damages, and what damages he found in respect of them.

This was an appeal from a decision of Mr. Justice KAY (42 Ch. D. 66), refusing an application by the defendants to vary the Chief Clerk's certificate made in the action. The facts of the case were as follows:—

On the 7th of June, 1876, the Peruvian Government entered into a contract (known as the Raphael contract) with the defendant company to consign to them for sale eleven cargoes of guano, in respect of which the company were to receive £4 15s. a ton for freight and other expenses, and the rest of the proceeds were to be for account of the Government, to whom the company were to make certain advances against the cargoes. The eleven cargoes were shipped at Lobos, on the coast of Peru, about December, 1879.

Disputes arose between the Government and the company as to whether the cargoes were within the contract; and the result of such disputes was that the Government purported to determine the right of the company under the contract, and sent the bills of lading of the cargoes to the plaintiffs, Messrs. Dreyfus. The company, however, claimed possession of the cargoes, and, with regard to four of the ships, gave directions at the port of call to the masters as to the ports at which they were to discharge.

[* 318] * On the 27th of April, 1880, the writ in this action was issued by Messrs. Dreyfus against the company and the masters of the ships, claiming delivery of the cargoes to the plaintiffs, and an injunction to prevent the company from receiving them.

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At this time two of the cargoes had arrived, and, apparently (though the evidence on the matter was not very clear), possession of them, either actual or constructive, had been taken by the defendants; but the other nine cargoes were still at sea.

The plaintiffs moved for an injunction and receiver, and on the 30th of April, 1880, an order was made on that motion, whereby, the company consenting, the action was dismissed against the masters of the eleven ships without costs; and the company undertaking that the receipt by them of the cargoes should be without prejudice to any question between the parties, and that they would keep separate accounts of expenditure and receipts in respect of the cargoes, and abide by any order the Court might make as to them or the proceeds of them, it was ordered that the costs of the motion should be costs in the action, and that the order should be without prejudice to any question in the action.

On the 16th of July, 1880, the statement of claim was delivered, claiming delivery to the plaintiffs of the cargoes, damages for their detention, and an injunction against the receipt of them by the company.

By their pleadings the company in effect alleged that they had taken possession of the cargoes under the Raphael contract, and claimed to be entitled, under that contract, to receive, sell, and deal with the cargoes: they denied that such possession was wrongful, and denied the plaintiffs' right to the property in the cargoes.

By an order of the 16th of September, 1880, the company were allowed to receive the cargo of one of the ships without prejudice to any question.

On the 17th of December, 1880, an order was made for the appointment of a receiver of all the eleven cargoes, or the proceeds of any sold, and on the 23d of February, 1881, a receiver was appointed.

By an order of the 8th of March, 1881, the company were, * nevertheless, permitted to sell the cargoes of two [* 319] other ships, and to pay the gross proceeds to the receiver, and by another order, of the 26th of February, they were permitted to retain £6316 4s. received for cargo of another ship (which had been sold out of Court) on account of expenses, which were to be paid to them without prejudice to any question.

On the 13th of January, 1885, Vice-Chancellor BACON gave

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judgment in the action, declaring the plaintiffs entitled to the cargoes, and that the company were not entitled to be reimbursed any expenses incurred by them in respect of any of the cargoes, except under the order of the 8th of March, 1881, and the judgment directed an inquiry "what damages have been sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes of guano in question in this action."

The company appealed against this judgment, but on the hearing of the appeal abandoned it except as to their claim to be paid £4 15s. per ton under the Raphael contract, or, in the alternative, to be allowed the freight and landing charges paid by them in respect of the cargoes which they had received under the order of the 30th of April, 1880. On the 12th of February, 1887, the Court of Appeal dismissed the appeal, and affirmed the judgment of the VICE-CHANCELLOR.

The company appealed to the House of Lords, and on the 18th of July, 1887, the House of Lords varied the judgment by allowing to the company the freight and landing charges so far as the same had not been already repaid to them or allowed to them in account with the Peruvian Government, but affirmed the judgment in other respects, Lord WATSON, who occupied the woolsack, stating that he thought that under the circumstances the actual receipt of the cargoes by the company must at least be regarded as a neutral, and not an adverse, act of possession. The counsel for the parties were invited by the House to make any suggestions for varying the terms of the judgment; but no such suggestions were made, and the inquiry directed by the VICE-CHANCELLOR, accordingly, remained as part of the judgment.

On the 12th of March, 1889, the Chief Clerk made his certificate, finding that the detention of the eleven cargoes commenced on the arrival of such cargoes, respectively, in England, [* 320] and that * the damages for such detention were as follows:

£2148 13s. 2d., diminution of gross proceeds owing to sale by receiver instead of plaintiffs; £351 6s. 10d., increased expenses of sale under Orders of Court; £26,757 2s., damages for loss of interest on those sums, and on actual proceeds of the cargoes computed at five per cent, till judgment, less interest gained in Court, and paid by receiver; £4854 6s. 9d., damages for non-payment of these moneys at four per cent from judgment to the date of the certificate.

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The company took out a summons asking that the certificate might be discharged, and the inquiry proceeded with on the footing that the plaintiffs were entitled to no damages; or that the certificate might be varied by finding that no detention took place, or that if any detention took place it occurred at Lobos; and, lastly, by striking out the whole of the sum found, and by finding that the plaintiffs had sustained no damages.

Mr. Justice KAY refused the application, and the defendants now appealed.

Previously to the hearing of this appeal, the defendants applied by motion to the Court of Appeal, for liberty to appeal from the portion of the judgment of the VICE-CHANCELLOR which directed the above inquiry; but their Lordships (COTTON, BOWEN, and FRY, L.JJ.), on the 21st of November, unanimously refused the motion, being of opinion that, after the proceedings before the House of Lords, it was not competent to the Court to accede to it.

The present appeal was then heard.

Sir R. E. Webster, A. G., Rigby, Q. C., and Haldane, for the appellants:—

There has never, in this case, been any detainee, properly so called. There has been merely a *bonâ fide* assertion of right, and neither in law nor in principle does a statement by a man that he intends to assert a right amount to detention for which damages can be given.

It is clear that previously to the order of the 30th of April, 1880, there had been no act—at any rate, with respect to the nine cargoes—which could amount to detention. By that order the cargoes were placed *in medio* by the consent and for the convenience * of both parties, and the defendants, for the [* 321] benefit of the plaintiffs as much as for their own, took the management of the property and were responsible for it, and, instead of holding the cargoes and spending the proceeds, and being liable in damages, they had to pay the money into Court and account for their receipts.

The House of Lords has decided that after the date of that order there was no wrongful possession, but that the possession taken was either with the consent of the plaintiffs, or at least neutral, the defendants receiving the cargoes upon the terms that that receipt was to be without prejudice to any question in the action. The effect of the judgment of the VICE-CHANCELLOR had been that

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everything which the defendants did after the 30th of April, 1880, was wrongful; that therefore all their expenditure was the expenditure of wrongdoers, and even, although it had saved the property of the plaintiffs, the defendants were not entitled to any reimbursement in respect of it. But the House of Lords have, in effect, reversed this conclusion, and it is inconsistent with their decision that any substantial damages for detention should be given. Indeed, it is not consistent with that decision that there should be an inquiry as to damages at all, but the attention of the House was not called to that point.

The inquiry directed by the VICE-CHANCELLOR was as to damages sustained by reason of the "detention" of the cargoes. "Detention" cannot mean "neutral possession," and the effect of the decision of the House of Lords is that there has been no detention. It has been said that the inquiry assumes detention, for that otherwise the words "if any" would have been inserted. But it cannot be contended that under an inquiry as to damages the Chief Clerk is bound to find substantial damages, when in fact there are only nominal damages, merely because the words "if any" are left out.

The inquiry, no doubt, exists and must be submitted to, but it ought not to be worked out on an assumed state of things, but on the actual state of things as ascertained by the judgment of the House of Lords.

[FRY, L. J. — It would be an impertinence on our part to rob of all meaning an inquiry directed by the House of Lords.]
 [* 322] * If the inquiry makes it necessary that some damages should be given, we say that the standard of damages which has been adopted is wrong. No *bonâ fide* claim of right gives a cause of action to the party against whom it is made. *Wren v. Weild*, L. R. 4 Q. B. 730, 734; *Quartz Hill Consolidated Gold Mining Company v. Eyre*, 11 Q. B. D. 674. In the present case the decision of *Williams v. Peel River Land and Mineral Company*, 55 L. T. (N. S.) 689, has been applied to detention under entirely different circumstances. Damages cannot be given for detention under an order made in a suit. The judgment of Mr. Justice KAY rests on a fallacy. The case is not like one where possession is wrongfully taken: it is one where the goods were lawfully in the possession of the defendants and were detained under a *bonâ fide* claim of right. There is nothing in the judg-

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ment which fixes us with detention for any particular period. Suppose we had detained each cargo for twenty-four hours only, that would have supported this inquiry — the insertion of which only estops us from saying that there has been no detention at all. The Judge may have directed the inquiry, being of opinion that there had been a lengthened detention entitling the plaintiffs to substantial damages, but that would not enable us to appeal from it; we cannot appeal against a Judge's reasons. *Attorney-General v. Tomline*, 15 Ch. D. 150. The Chief Clerk has not inquired from what period detention began; he has inferred from expressions used by the Judge that detention began as to each cargo as soon as it arrived in England. There is no case to be found supporting the view that a plaintiff can obtain the appointment of a receiver and claim damages for detention of the property while it is in the possession of the receiver. Lord Cairns' Act (21 & 22 Vict., c. 27) was an Act to improve the procedure of the Court of Chancery by enabling that Court to give damages in certain cases, and, no doubt, gave the Court of Chancery jurisdiction as matter of procedure to award damages where a Court of law could not have given them, *e.g.*, damages which accrued after the commencement of the action: *Chapman, Morsons, & Co. v. Guardians of Auckland Union*, 23 Q. B. D. 294; and the jurisdiction so originally given to the Court * of Chancery may now, in an extended [* 323] form, be conferred on Courts of law. But the Act did not create new rights, or enable the Court to award damages where no actual wrong had been committed. *Ferguson v. Wilson*, L. R. 2 Ch. 77, 80.

The certificate is, in any view, clearly wrong in calculating interest from the time of the landing of the cargoes, upon the erroneous hypothesis that the cargoes could have been sold immediately.

Sir Horace Davey, Q. C., Bigham, Q. C., and Ingle Joyce for the plaintiffs, the respondents:—

The Court is in effect asked to say that the VICE-CHANCELLOR was wrong in directing this inquiry, and that the House of Lords were wrong in affirming this portion of his judgment. After two appeals we are still called upon to justify the grounds upon which the VICE-CHANCELLOR thought that this inquiry was the mere corollary of his judgment.

The simple duty of the Chief Clerk was to ascertain the *quan-*

tum of damages under this inquiry, referred to him by the Vice-Chancellor BACON, and left undisturbed by this Court and by the House of Lords. The scope and object of the inquiry were clear. The plaintiffs had been kept out of possession of the eleven cargoes, which were their property, by the wrongful acts of the defendants. The fact that loss had been occasioned was not disputed; all the Chief Clerk had to do was to ascertain the amount of the loss. There could be no doubt as to the meaning of the term "detention." It referred to that detention which the defendants maintained and justified by their pleadings. At this stage of the proceedings the plaintiffs are not concerned to inquire whether this is or is not an action of detainue. It is sufficient to say that there was ample evidence before the VICE-CHANCELLOR to justify the direction of this inquiry. It was proved that the defendants had asserted their control over the cargoes by giving directions at the ports of call that the ships should be taken to ports of their own choosing.

The consent order of the 30th of April, 1880, was expressly made without prejudice to any question in the action, and [* 324] one * of such questions was that of damages. The order was consented to as a matter of convenience to prevent loss by forced sales, and because the defendants were claiming possession as of right.

The decision of the House of Lords was solely with reference to the right of the defendants to be recouped their disbursements, and did not in any way touch the question whether or not they were liable in damages. The judgment of the House did not pass *per incuriam*. The terms of it were carefully considered.

Under Lord Cairns' Act (21 & 22 Vict., c. 27), s. 2, the VICE-CHANCELLOR had jurisdiction to give damages. In the days of Lord ELDON the plaintiffs would have obtained a decree affirming their right to these cargoes at the time of bill filed, and a perpetual injunction to restrain the defendants from interfering with them. In the meantime the cargoes might have rotted. Lord Cairns' Act was framed to remedy this mischief. Treating this as a *quia timet* action to restrain a threatened wrong, we submit that Lord Cairns' Act is clearly applicable. The jurisdiction conferred on the Court of Chancery by that Act extended to cases in which damages would not be recoverable at law. *Eastwood v. Lever*, 4 D., J. & S. 114, 128

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[BOWEN, L. J. — Do you assert that under Lord Cairns' Act damages could be given in a case where actual legal wrong had not been committed but only threatened?]

The jurisdiction to give damages was not dependent upon its being shown that an action at law could be maintained. And although by arrangement of the parties or otherwise an injunction had become unnecessary, damages could be given. *Catton v. Wyld*, 32 Beav. 266; and see *Chapman, Morsons, & Co. v. Guardians of Auckland Union*, 23 Q. B. D. 294. Not only are the damages not confined to such as could have been given in an action at law, but they may be awarded on a different scale. If the plaintiffs had obtained an *interim* injunction, and then failed, at the hearing, to establish their right to the cargoes, they would have had to pay, under the usual undertaking, damages to the defendants for keeping them out of possession by reason of the claim so wrongfully * set up. This case is the converse of that, [*325] and why, therefore, should not the defendants be held liable to pay damages to the plaintiffs?

As to the subsidiary point taken as to the mode of calculation of interest, it is enough to say that the point is not raised by the summons to vary, and was not taken in the Court below.

Rigby, in reply, referred to *Davenport v. Rylands*, L. R. 1 Eq. 302; *Fritz v. Hobson*, 14 Ch. D. 542; and *Cooper v. Cooper*, 13 App. Cas. 88.

COTTON, L. J. :—

This is an appeal from the decision of Mr. Justice KAY refusing to vary the Chief Clerk's certificate. [His Lordship stated the nature of the proceedings, and continued:—]

Under these circumstances the defendants have put us in the greatest difficulty. In my opinion we cannot inquire whether the portion of the judgment of the Vice-Chancellor BACON, which is now in question, — no longer his judgment, no longer our judgment, but the judgment of the House of Lords, — is right or wrong. But as there was no actual possession of these cargoes, and therefore detention, in that sense, before the order of the 30th of April, 1880, it is necessary to ascertain what this inquiry can refer to.

I have not thought it right to go through the evidence in this case for the purpose of seeing whether the decision of the VICE-CHANCELLOR was right or wrong, but that decision does assume,

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and, in fact, give directions founded only upon this, that there had been that which amounted to detention so as to justify the plaintiffs in asking for, and the Judge in awarding, damages which had been sustained by reason of that detention.

It is, however, right to look at the pleadings, because they show what was the case on which the VICE-CHANCELLOR was deciding. [His Lordship referred to the pleadings, and continued:—]

Now, having regard to these pleadings, in my opinion, what the VICE-CHANCELLOR decided was, that the defendant company

had been guilty, not by setting up this claim in this [* 326] action, but * by their action in the matter, of such con-

duct as amounted to detention, thus preventing the plaintiffs from getting, as they would otherwise have done under their bills of lading, possession of these cargoes. I do not at all enter into the question whether that was right or wrong. We are not at liberty, in my opinion, to discuss or enter into that question, because the defendants have prevented us from doing so. They contended at the hearing that they had taken possession; they stated how it was that they got possession; and whether they were right or wrong, whether their counsel was right or wrong in that view or not, in my opinion we must take it that the view of the VICE-CHANCELLOR was based upon that. And it must be remembered that this inquiry was directed after the judgment was delivered, and when the minutes which, as I gather from the shorthand writer's notes, had been prepared by the plaintiffs' counsel, had been handed up, and the VICE-CHANCELLOR requested the counsel then present for the defendants to consider carefully whether the minutes were right, and whether the order which he, was going to pronounce was right or not, and not one single word was said against this inquiry being directed.

Well, therefore, here is the inquiry which embodies, in fact, a declaration that there had been a detention. It is founded on a decision of the VICE-CHANCELLOR that there was a detention of which the defendants had been guilty which justified him in holding them liable to damages. In my opinion (it may be very unfortunate) we are not in a position to inquire into that. Whether the House of Lords will think that it can do so, I give no opinion at all; but Lord Justice FRY suggested that the appellants should go and see whether the House of Lords would think that was still open, having regard to what they had done when the appeal came

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before them; but, and I think reasonably, the Attorney-General declined to accept that offer, and desired the appeal to continue.

Then it is said that this finding as to damages is inconsistent altogether with the finding of the House of Lords when that appeal was before the House, and when it was decided that the defendants appealing were entitled to such payments as they had made in consequence of the order of the 30th of April, 1880.

* If it could be seen that, in fact, the decision of the [* 327] House of Lords was at variance with any such finding, we should be put into a great difficulty by the action of the defendants, but I do not think that is really the result of the decision. [His Lordship referred to the proceedings before the House of Lords, and continued:—]

I think we cannot say that this decision of the Vice-Chancellor BACON, on which the certificate is founded, is at variance with the decision of the House of Lords. If it be so, the House of Lords, when the matter comes before them, will, if they think they have any power to do so, act upon it as justice may require.

Then the real argument against this certificate was that there was nothing, in fact, done which would justify the Court in granting to the plaintiffs any damages for anything which can be called detention on the part of the defendants. That is, in fact, to reverse the decision, and to strike out this inquiry which the VICE-CHANCELLOR has directed, because, although it was said that that might be done by giving nominal damages, yet, as I put it to Mr. Rigby, I cannot understand how, if no act has been done by the defendants which justifies any damages being given against them, even nominal damages could be given. If that course is taken it is assumed that an act has been committed which justifies a claim for damages, but that the damages are so small that the Court will not give substantial damages. Very likely juries in exercising their peculiar function do sometimes deal with a case in the way which has been mentioned, but it will not do for Mr. Justice KAY, or for this Court, to exercise that unknown equity which is sometimes exercised by juries, and, in my opinion, we cannot, unless there is some reasonable ground for differing from the finding of the Chief Clerk as to damages, in any way vary the certificate.

It was said that here the Chief Clerk and Mr. Justice KAY have put all the cargoes upon the same footing, and that interest was

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calculated from the time when the cargoes were landed. That, I think, was on this footing, that if the defendants had not by their acts detained these cargoes, thus preventing the plaintiffs [* 328] from getting them without recourse to a Court of * equity, then at that time the plaintiffs would have got possession of the cargoes, and from that time it is that the interest is calculated; that is to say, as from the time when, but for the detention of the defendants, the plaintiffs would have got possession of these cargoes; I cannot see, therefore, that we can interfere there.

There was another point that was argued by Mr. Rigby, namely, that these cargoes could not all have been sold immediately. That really caused some doubt in my mind whether the certificate was quite correct in fixing a date as if they could be sold immediately. But that point was never raised at all, either in Chambers, so far as one can see, looking only to the evidence, or before Mr. Justice KAY, nor was it really raised by the summons to vary. Therefore, in my opinion, we should be wrong, even if, *primâ facie*, it seemed to us that the matter might have been differently treated both by the Chief Clerk in Chambers, and by Mr. Justice KAY when the matter was before him, when this point was not raised at all by the defendants; to allow them now to have the matter sent back on a point which they had not raised, and which has only occurred to them at the last moment. In my opinion the appeal fails.

I should mention that *Cooper v. Cooper*, 13 App. Cas. 88, was referred to by Mr. Rigby as a decision of the House of Lords which would enable us and require us to act according to his contention here as regards this inquiry as to damages. But that was a different case. There the matter was before the House of Lords, and although there was a question whether the interlocutor of the Court of Session could be appealed from, yet the matter was before them, and they, taking a different view as to the law which ought to govern the case, and having the matter before them, were at liberty to act, and did act, upon that view so as to decide the case on the law really applicable to the case before them. But here we are in a very different position after the affirmation of the judgment of the VICE-CHANCELLOR both on appeal to this Court, and on appeal from this Court to the House of Lords.

[* 329] * BOWEN, L. J. : —

I regret that I am unable to take the same view as the

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LORD JUSTICE. This unhappy case has got into a tangle which my Brother, the Lord Justice COTTON, thinks absolutely desperate, but which I think is capable, even at this eleventh hour, of still being remedied without there being applied to it so drastic a measure as that which destroyed the Gordian knot. To put it broadly, it seems to me that the conclusion at which the LORD JUSTICE has arrived does not give adequate effect to the law as laid down in the judgment of the House of Lords, and I do not, myself, feel the same difficulty that he does in discovering a way in which due effect can be given to it.

Now the facts of this case I do not propose to discuss, except so far as they are uncontroverted. I will only mention a few of the uncontroverted facts, in order to make the remainder of my reasoning intelligible. Eleven cargoes of guano started from Lobos for England in ships which were chartered at the risk and on account of the Peruvian Government by the company, the defendants in this action. A quarrel took place on the other side of the seas, in consequence of which the Peruvian Government determined the right, so far as they could, and in law I think they did determine the right, of the guano company to take delivery of these cargoes as agents for the Peruvian Government or otherwise upon the remainder of the ships, and they further transferred the title to the guano which was in themselves, and the right, accordingly, to take delivery, to the plaintiffs in this action. The title of the plaintiffs accrued while the ships were sailing across the seas. The ships arrived at intervals. Two of them, I will assume, were taken possession of, and wrongfully taken possession of, by the defendants. I will assume that for the purposes of my judgment. The remainder were still on their way when a writ was issued to raise the real question between the parties, which was as to the right to take possession of the cargoes, — a writ which as regards the two ships which had already arrived might be based upon a wrong already done, and threatened to be continued, but which, with regard to the other ships, which were still on the sea, for anything we know, was simply in the nature of a *quia timet* action to prevent *a threat which [* 330] had been expressed from being exercised. A few days after the writ an order was made in the action by consent in which it was agreed, obviously in the interests of both parties, as they thought, — for it is unimportant to consider whether the order has

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worked out to the detriment of one more than the other, — that the receipt of the cargoes of guano by the defendants should be without prejudice to any question between the parties, that they would keep separate accounts of expenditure and receipts in respect of the cargoes, and abide by any order which the Court should make with respect to the other cargoes.

Now, two things seem to me to be perfectly clear; the one, that eight or nine of the ships — I will call it nine for the purposes of my judgment, without investigating the question as to the number — were upon the high seas at the time when that order was made, and the cargoes were taken possession of by the defendants under that order. The second thing that seems to me to be perfectly clear is that the *ratio decidendi* of the House of Lords in the case which went before them was that no wrongful act consisted in the taking possession of any cargoes under that order. It was necessary for the House of Lords so to decide. The point made was that the reimbursement of the freight which the defendants claimed would be inequitable and unjust, as they were wrongdoers in respect of the taking of possession. The House of Lords said they were not wrongdoers in respect of the taking of possession, and that, therefore, the point made could not arise. I pause for one moment to observe that the House of Lords did not feel themselves hampered in coming to that conclusion as to the wrongful possession taken under the order, by the mere fact that an order for an inquiry had been made in the action, which was not appealed against, and which seemed to assume the detention of all the cargoes. Now these two things seem to me to be perfectly clear; first, the *ratio decidendi* of the House of Lords, and, secondly, that, as regards nine of the ships, if no other act were done in respect of them — and, as far as we know, nothing was done, though it will be seen presently I do not conclude that question — than the mere taking possession under that order, that was not wrongful.

[* 331] * Having said so much as to what seems to me to be clear I proceed to state wherein the difficulty now arises, and in order to explain that I must review, shortly, the course which this action took. The action, when launched, as I have said, was, for anything that appears to the contrary on the facts before us, as regards several of the cargoes, a *quia timet* action. At the time when the action came to be tried, and, I think, at

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the time when the pleadings were delivered, the cargoes had been successively arriving. At the time when the action was tried they all had arrived, and had been taken possession of. In the pleadings, after the order of the 30th of April, 1880, it was useless for the defendants to deny the mere fact of possession of the cargoes. They either had received them, or were going to receive them. The point they desired to make was that they had a right to receive them, and a title to the proceeds after the sale under a contract with the Peruvian Government. Now I do not myself see that the mere fact that on their pleadings, when the question was one of right, they allege that the possession which they had admitted they had of the cargoes was under a contract with the Peruvian Government, in any way prevents them setting up the fact that the possession was rightful, if that particular point under which they sought to justify it should fail. I think it was an alternative allegation which does not prevent them showing that the Court had decided the truth. If it did, it seems to me it ought to have been an answer on the appeal to the House of Lords that they had admitted a wrongful possession, and had claimed a possession only in virtue of a contract which could not avail them, and that, therefore, there was a wrongful act or a detention. At the time when the VICE-CHANCELLOR tried the action it appears to me (I do not hesitate to say it, because one can say it without disrespect to the eminent counsel who have conducted the case) that by an error in judgment counsel did not address themselves to one of the real points in the action, which since has been seen, by the light of subsequent investigation, to be important, namely, whether there was any wrongful act at all in respect of nine at least of the cargoes. They admitted the possession, justifying it only upon their title. The VICE-CHANCELLOR found that they were in possession. It was not *disputed. He [*332] said it was admitted, and he ordered an inquiry as to damages upon that footing.

The matter came to this Court, and though the order as to damages was in form appealed from, it was not, in fact, because that portion of the appeal was abandoned during the argument. From this Court they went to the House of Lords, and they still continued their policy of abandoning the appeal against that order for inquiry, and, accordingly, in the event, the House of Lords did not disturb the portion of the judgment of Vice-Chancellor

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BACON, which they were not asked to disturb, and, nobody perceiving the importance of the lapse, this strange result has followed, that the House of Lords have declared that there was no wrongful act done in taking possession under the order of the 30th of April, 1880, but have left undisturbed an order for an inquiry which proceeds upon the footing that there was detention of all the cargoes, — an order the maintenance of which can only be explained in one of two ways, either that it was an oversight, or that there were other possible acts of detention in respect of all the cargoes over and above the mere taking possession under the order of the 30th of April. But, as I said before, one thing is clear, that the House of Lords have declared that one class of acts done in respect of these ships was not a wrongful detention, namely, the taking possession under the order of the 30th of April, 1880.

Now the parties went back under this inquiry. The Chief Clerk in his certificate has, in my opinion, fallen into error. The vice of his certificate appears to me to be this, that although it is evident that it was necessary to discriminate between the various acts done with respect to these cargoes, because as to one class of acts the House of Lords has declared nothing to be wrongful in that particular, the Chief Clerk has lumped all the ships together, and assessed the damages upon a footing which leaves it open at all events to the view, and in my opinion necessitates the view, that he has as regards the whole of the ships treated as a wrongful act that very matter which the House of Lords said was not wrongful. The vice of the certificate is that it lumps the ships together. Can that be set right? Sir Horace Davey, in the first place protesting that he was not bound to argue the facts [* 333] of the * case, assumed for the purpose of his argument that there had been no tortious act in law at all; nevertheless, he said, there was nothing wrong in giving damages because Lord Cairns' Act clothed the Court of Chancery with the jurisdiction, where no wrong had been done in law at all, nevertheless, on a threat of injury which would give rise to the jurisdiction for injunction, to give damages in substitution for such injunction. I speak with perfect consciousness that I am only a proselyte at the gate in matters of equity, and what I have learned about it has been learned from wiser people than myself who sit with me, but I am still giving my opinion as I am

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entitled and bound to do. I am of opinion that the second section of 20 & 21 Vict., c. 27, commonly called Lord Cairns' Act, did not clothe the Court of Chancery with such a jurisdiction. It is true the section applies in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, but the only weapon with which the Court is armed by virtue of the section is to award damages to a party injured, which must, I think, mean damages where damages have arisen; and in a case where no damages have arisen, in the ordinary sense of the term as known to lawyers, I am of opinion the Court has no power to give damages. I should be alarmed if that were my opinion only, but I believe I am justified in saying that my learned Brother, Lord Justice COTTON, agrees with me in that, and I will leave my other learned Brother to say whether he differs from me or not. But this I may say, as it was asserted by Sir Horace Davey — at least, Sir Horace Davey seemed to put it forward as a proposition — that the practice in the Courts of Chancery had been in favour of his view, I have consulted others who are familiar with the practice among my colleagues, and I am told they are not aware of any such practice. I am specially informed by one who certainly can speak with authority on the point, that the view which I am now taking of this subject is the view taken by the late MASTER OF THE ROLLS.

Sir Horace Davey, however, went further, and put forward a moral justification of the view. He said that these plaintiffs had been kept out of their property for many years, and that they ought to be compensated. The term "kept out of their property" * seems to me to beg the question. If all that [* 334] has been done is to threaten, and in consequence of a threat they have come to an arrangement that the cargoes shall be placed in the hands of the defendants to do their best with them, that threat and that consent order, although it may have been detrimental to the interests of the plaintiffs, is not a keeping out of possession which may give rise to damages under Lord Cairns' Act. The truth is that the expression begs the question. They were kept out of a great portion of their property by reason of entering into the order of the 30th of April, 1880; that is to say, they kept themselves out of it. I regret very much that they were driven by a wrongful threat into consenting to that order, but it does not enable any one to strain the law, and to find under

the head of damages any acts which, as far as I know, there is no authority for treating as a source from which damages can flow.

But then, if Lord Cairns' Act does not apply, is there any wrongful act which can be assigned as an explanation of the VICE-CHANCELLOR'S judgment? Sir Horace Davey protested against being compelled to discuss that question, and I do not propose to decide it, because I do not consider that we have the materials on this appeal, or certainly they have not been brought to our attention in argument in a way that enables me to be quite certain on the point. One thing I do myself think, and that is that the Vice-Chancellor BACON only proceeded, so far as I read his written judgment, upon the assumption that there had been a possession taken, and that that possession could not be justified; and he assumed that that made an act of detention, a view which is, as regards a certain number of the cargoes, invalidated in my mind in law by the judgment of the House of Lords. There was the carriage of the guano across the Atlantic. The title of the plaintiffs began after it arrived, and the defendants were merely charterers of the vessels. There were directions given at the ports of call. I can conceive directions given as to a port of discharge which might amount to acts of trespass, but we have not got the facts here before us to enable us to say what was done in respect of the indication at the port of discharge, if anything was done which could by any human imagination be construed as amounting to a wrongful act or an act of trespass. But I [*335] *do not investigate the question as to what was done with respect to it, because I do not know that I can do so effectively. There may have been, and I believe there was, with regard to one cargo, a wrongful act even after the order of the 30th of April was agreed to; and in respect of any wrongful sale after the order, I am not prepared to say that that might not be a source of damages under Lord Cairns' Act done before the inquiry as to damages; and, perhaps, the extension — if it be an extension — of the principle laid down in the case of *Williams v. Peel River Land and Mineral Company*, 55 L. T. (N. S.) 689, and acted upon by my Brother, the Lord Justice FRY, in the case which was cited, of *Fritz v. Hobson*, 14 Ch. D. 542, and subsequently embodied, I believe, in an order under the Judicature Act, would apply to such a case. I leave that open. Finally, there is the possession under the order of the 30th of April, 1880, but I

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will not assume for this purpose that even that order justifies everything that was done as regards all the cargoes. It would require me, before I came to that conclusion, to know exactly what was done with respect to the two which had been already landed, and whether it was possible, notwithstanding the expression of opinion of the House of Lords that for the purposes of freight all the cargoes were to be taken as being in the same boat, still to differentiate the case of those two cargoes in respect of the acts done before the order of the 30th of April, 1880. I leave that still open.

I come back to this, that although the history of these cargoes differs, that although, as regards a large number of them, it is obvious that the possession was taken under the consent order, and was not wrongful according to the view of the House of Lords, the Chief Clerk has made no distinction between any of those cargoes, has lumped them together, has possibly, I say probably or certainly, proceeded upon the view that the taking possession under the order was itself an act of detention from which damages would flow, and in that view, to my mind, his certificate is bad. His certificate states that he takes the damages from the arrival of the cargoes upon land. Now how far is it true that he was driven by this order of inquiry to go this length? That order of inquiry directs that there shall be an * investigation as [* 336] to what damages have flowed from the detention of the eleven ships.

Sir Horace Davey suggested that if there had been no possible damages at all, the words "if any" ought to have been introduced after "damages;" and that the order ought to have run for an investigation as to the damages, if any, which flowed from the detention, if any, of the eleven cargoes. I think that is so. I think the stage at which this order was made indicates that the Court assumed that there would be damages in respect of these cargoes; but I draw the line there, and I protest that it does not follow from that, that the Court declared that substantial damages must be given. No authority can be found for that proposition. It is untrue as regards the form of rules of inquiry with which I am acquainted. I will mention, for example, the case of bonds, and the inquiry directed by statute with regard to them, and also the form of a writ of inquiry under the Judicature Act, when a judgment is given by default. The Court, to my mind, does not

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find that there are substantial damages. What is true is, that the Court finds that there has been a wrong, and assumes that there may be substantial damages, not that there must be. It is for the Chief Clerk to inquire, it seems to me, and I cannot myself understand why a Chief Clerk would not be justified under such an order in finding there were nominal damages only in respect of one or more or all of these ships. Suppose for a moment the case of a single one of these ships; suppose it was clear to demonstration that one of these ships had been inserted in the order by a mere mistake, that there had been no detention at all of the ship, and that the ship, so far from being taken possession of by the defendants, had been taken possession of by the plaintiffs, had been sold by them, and they had appropriated the profits. Is the Chief Clerk positively bound to give more than nominal damages in such a case? He may be constrained by the form of the order to assume that there is a detention, but he may look to see what the detention is in order that he may know what damages flow from it. To my mind it would be extraordinary, indeed, if a Chief Clerk was bound to look to find damages without knowing what the acts of detention were in respect of which he [* 337] found them. He must look * to see what the detention is in order to know whether the damages are too remote, and I think that if it was clear that there had been no possible act of detention as to any one or more of these ships, I should feel myself no hesitation (but then, as I said before, I am only a proselyte at the gate) in saying that upon tender of nominal damages in such a case, and payment of nominal damages, all further proceedings on the inquiry might be stayed. But this is not really necessary from my point of view to decide. As I said, I consider the vice of the Chief Clerk's certificate is, that he has lumped all these ships together. I am ready to assume that there may be in the case of all the ships some other acts of detention than those which lie upon the surface in respect of what was done under the order of the 30th of April, 1880. There may have been something done in the indication at the port of discharge, and there may have been something done in respect of the ships taken possession of whose cargoes were landed, and there may have been something wrongfully done in respect of the cargoes that were landed under the order of the 30th of April, 1880. All that is for the Chief Clerk to state. As soon as it is seen that by lump-

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ing the ships together he has done injustice, he ought to be called upon to state, as he has acted upon this view hitherto, what are the acts of detention in respect of each of these ships on which he relies, and what are the damages which he assesses in respect of them.

To my mind, therefore, the right way of dealing with this case is to declare in accordance with the opinion of the House of Lords that no act of possession merely taken under the order of the 30th of April is a wrongful act or gives right to any damages at all; refer back to the Chief Clerk to state with regard to these eleven ships what are the wrongful act or acts of detention in respect of which he finds damages, and what damages he finds in respect of them.

I ought to say that that form of reference, if it was followed by the Court, would leave it open to the Chief Clerk, as I understand it and as I intend it, to rectify the error into which he seems to have fallen (for no argument was addressed to us by Sir Horace Davey to prove that he had not fallen into it) as to the calculation of the dates from which the interest should run.

* There is a difficulty about costs. The costs of the [*338] inquiry are reserved. I think the costs of the appeal in this case ought to be borne by the respondents. As to the costs in the Court below, in consequence of the tangle in which the case has been involved, I should make no order, but should leave either party to bear those.

FRY, L. J. [after commenting upon the anomalous position in which the case had been left by reason of the inquiry as to damages having been affirmed by the decree of the House of Lords, concluded as follows]:—

I therefore feel constrained, though extremely embarrassed as to what is the true course to take, to concur in the view of the Lord Justice COTTON, and think that this appeal must fail, with the usual results.

I have only one other observation to add. I entirely agree with what has been said by Lord Justice BOWEN on the subject of Lord Cairns' Act. I am clear that the statute often enables the Court, where a wrong has been done, to give damages upon a different scale from what was done by the Courts of common law, because it may give them in substitution for an injunction; but where there has been no wrong done, it appears to me that Lord Cairns' Act confers no power to give damages.

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COTTON, L. J. :—

I agree with what has been said by Lord Justice FRY as regards Lord Cairns' Act. I did not advert to it because I did not think it a matter which arose, taking my view of the case, before us.

Shelfer v. City of London Electric Lighting Company.

Meux's Brewery Company v. City of London Electric Lighting Company.

1895, 1 Ch. 287–325 (s. c. 64 L. J. Ch. 216; 72 L. T. 34; 43 W. R. 238).

[287] *Nuisance.* — *Injunction.* — *Damages.* — *Electric Lighting Act*, 1888. — *Lord Cairns' Act* (21 & 22 Vict., c. 27).

Lord Cairns' Act (21 & 22 Vict., c. 27), in conferring upon Courts of equity a jurisdiction to award damages instead of an injunction, has not altered the settled principles upon which those Courts interfered by way of injunction; and in cases of continuing actionable nuisance the jurisdiction so conferred ought only to be exercised under very exceptional circumstances.

There is nothing in the Electric Lighting Act, 1882, to relieve undertakers thereunder from liability to an action at common law for nuisance to their neighbours caused by their works.

An electric lighting company erected powerful engines and other works on land near to a house which was subject to a lease. Owing to excavations for the foundations of the engines, and to vibration and noise from the working of them, structural injury was caused to the house, and annoyance and discomfort to the lessee. The lessee and the reversioners brought separate actions against the company for an injunction and damages in respect of the nuisance and injury thus occasioned.

KEKEWICH, J., after finding on the evidence that the defendants had created a continuing nuisance as regards the lessee, and had caused structural injury to the house, *held*, that both the lessee and the reversioners were entitled to relief, but, under the circumstances, by way of damages and not of injunction.

The plaintiffs in both actions appealed against the refusal of the injunction; and the Court of Appeal *held* that there was nothing in either case to [*288] *justify the Court in refusing to aid, by injunction, the legal rights which had been established, and that the appeal must be allowed.

Per A. L. SMITH, L. J. : It may be stated as a good working rule that damages may be given in substitution for an injunction in cases where there are found in combination the four following requirements; viz., where the injury to the plaintiff's legal rights is (1) small, (2) capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction.

William Shelfer was the leaseholder and Meux's Brewery Company were the reversioners of a public-house more than forty

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years old, known as the Waterman's Arms, situate at Bankside, on the River Thames. The lease to Shelfer (in respect of which a premium had been paid) had been granted by the company in March, 1893, for a term of twenty-one years, at the yearly rent of £70. The premises had formerly been occupied by Shelfer as a yearly tenant, and previously to the lease to him they had been put in thorough repair by the company.

The defendants, the City of London Electric Lighting Company, were a company who were incorporated under the Companies Acts, 1862 to 1890, and entitled to the benefit and subject to the provisions of the City of London Electric Lighting (Brush) Order, 1890, and other orders granted provisionally by the Board of Trade under the Electric Lighting Acts, 1882 and 1888, and duly confirmed by Acts of Parliament.

The defendants, in the end of the year 1891, acquired land adjacent, but not contiguous, to the Waterman's Arms, and situate on the western side thereof, and they erected on the land so acquired sheds, engine-houses, a shaft, and all the buildings and machinery necessary for forming a large central station for the purpose of supplying electric light over a considerable area of the metropolis comprised within their limits of supply. Foundations for the works were sunk from twenty-five to thirty feet below the surface of the ground, and engines (some of which

* were not more than thirty feet distant from the western [* 289] wall of the Waterman's Arms) of 500 and 1000 horse-power were erected and fixed and commenced to work.

These two actions were brought by Shelfer and Meux's Brewery Company, claiming injunctions to restrain the defendants from so working their engines and so carrying on their works at Bankside as by reason of vibration or otherwise to cause damage to any part of the premises known as the Waterman's Arms, or the structures, fixtures, or fittings thereof, or to interfere with the enjoyment of the premises by the occupier for the purposes of his business as a licensed victualler and innkeeper or otherwise, or so as in any way to cause annoyance or nuisance or danger to such occupier, or the persons inhabiting or frequenting the premises, or so as to cause any injury to the premises or the business carried on upon the same. Damages were claimed in both actions.

From the evidence of witnesses called on behalf of the plaintiffs, it appeared that until October, 1893, the noise and vibration

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arising from the working of the engines was not noticeable, but that in that month the working of the engines began to cause the rooms, furniture, and bedsteads in the Waterman's Arms to vibrate so as to interfere with the sleep, comfort, and health of the occupiers, and two of the witnesses stated that the vibration caused actual sickness. Clouds of steam were also emitted from the defendants' premises for hours at a time, causing showers of moisture to descend on the premises of the plaintiffs. A crack also appeared in the wall of the public-house, which in March, 1894, extended through two storeys, and was in some places two inches in width; and a hearthstone in one of the upper rooms became displaced. The house had formerly a settlement or list to the east, but by reason of the erection of a substantial building on adjacent land, about eighteen years ago, and, more recently, by reason of the erection of the defendants' buildings, the list to the east had ceased, and become converted into a list to the west. Witnesses called by the plaintiffs attributed the structural damage to the vibration caused by the working of the engines.

There was evidence that the defendants were producing electricity by means of engines of from 4000 to 5000 horse-
[* 290] power, * and that, unless restrained from so doing, they were about to increase their engine power to not less than 20,000 horse-power.

The defendants admitted that some noise arose from their exhaust-pipes, but undertook to take all reasonable means to abate it, and it was proved that they had works in course of construction which would effect that object. As to the vibration, they adduced evidence tending to show that it was of a trivial character. The existence of the crack in the wall was not denied, but there was evidence tending to show that the structural injury to the plaintiffs' premises was owing to subsidence arising from the abstraction of water consequent on the digging of the foundations for the engines in moist soil.

It was not shown that the plaintiff, Shelfer, had suffered any direct pecuniary loss, or that the business of a licensed victualler carried on by him at the Waterman's Arms had fallen off by reason of the acts of the defendants.

There was evidence that the defendants had carried out their works in the best possible manner, and there was no evidence of negligence on their part. It was stated that six miles and a half

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of the principal thoroughfares in the city of London were lighted with arc lights, the current for which was generated at the defendants' works; that the main thoroughfares in the city were lighted exclusively with arc lamps, and the gas standards were being removed; and that the electric light was being supplied to the Royal Exchange, Bank of England, Mansion House and Guildhall, and other public buildings, and to the offices of fifteen hundred firms in the city.

Section 82 of the City of London Electric Lighting (Brush) Order, 1890, confirmed by the Electric Lighting Orders Confirmation (No. 15) Act, 1890 (53 & 54 Vict., c. cexxxix.), is as follows: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them."

The actions came on for hearing before Mr. Justice KEKEWICH, on the 12th of April, 1894; and on the 19th of April he gave judgment, finding that the acts of the defendants constituted a nuisance, and had damaged the plaintiffs' premises so as to make them less comfortable, to injure the structure, and decrease the value; but on grounds which are referred to in the judgments (particularly that of A. L. SMITH, L.J.), delivered in the Court of Appeal; he refused an injunction and granted only an inquiry as to damages.

* The plaintiffs in both actions appealed against this [*303] decision so far as it refused the injunctions claimed therein.

The appeals came on for hearing on the 23rd of November, 1894.

The appeal of William Shelfer, the lessee, was argued first.

Warmington, Q. C., and Badcock (Waggett with them) for the plaintiff, Shelfer:—

The nuisance is established; the defendants have not proved that it cannot be prevented, and upon the findings of the learned Judge the plaintiff is entitled to an injunction. It is true that under Lord Cairns' Act (21 & 22 Vict., c. 27) the Court has jurisdiction to award damages instead of an injunction; but, except where the plaintiff has disentitled himself to the injunction by his personal conduct, as by laches, in all the cases in the books since the passing of the Act in 1858, and from *Isenberg v. East India House Estate Company*, 3 D., J. & S. 263, down to *Martin v. Price* [1894], 1 Ch. 276, where damages have, against the will of the plaintiff, been awarded in lieu of an injunction, the injunc-

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tion sought for has been mandatory. The number of such cases is fourteen, and although Lord Cairns' Act is not in terms confined to mandatory injunctions, yet the discretion conferred by the Act will only be exercised in accordance with the established practice of the Court.

[They were stopped by the Court.]

Moulton, Q. C., and Renshaw, Q. C. (W. C. Braithwaite with them), for the defendants:—

The Court below having exercised its discretion by giving damages instead of an injunction, this Court ought not to review that decision.

[LINDLEY, L. J. — Is not the rule laid down by the House of Lords in *Imperial Gas Light and Coke Company v. Broadbent*, 7 H. L. C. 600?]

That decision was before Lord Cairns' Act (21 & 22 Vict., c. 27), the 2nd section of which conferred upon the Court of Chancery a jurisdiction, which it did not previously possess, of awarding damages in substitution for an injunction "in all cases" [*304] in * which it had jurisdiction to grant an injunction "against the commission or continuance of any wrongful Act." Now, the respondents do not object to paying damages or compensation, but they strongly object to an injunction, which, if it did not put a stop to their business, would seriously hamper them in the performance of their duties.

They have done their best to carry on their works in a proper manner; they are doing all they can to abate any nuisance; and they are entitled to resist the injunction by every means in their power. The cases relied on by the plaintiff are light and air cases; but the obstruction of light and air stands on a different footing from nuisance, and the Court will be more inclined to regard damages as a sufficient remedy in the latter case. *Viscountess Gort v. Clark*, 16 W. R. 569.

[Warmington, Q. C. — There the appeal was the defendant's, the plaintiff making no complaint of the order directing an inquiry as to damages.]

[Lord HALSBURY. — That case does not raise the question.]

In *Holland v. Worley*, 26 Ch. D. 578, damages were awarded in lieu of an injunction for threatened injuries.

[LINDLEY, L. J. — The practice is laid down by Lord CRANWORTH in *Stokes v. City Offices Company*, 13 L. T. (N. S.) 81.]

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The defendants were justified in what they have done by their statutory powers and authorities, and they rely upon them for protection. This argument goes also to the question of damages.

The Electric Lighting Act contemplates that a nuisance may arise, and provides compensation. The effect of that Act and of the Provisional Order is to impose upon the defendants the duty of supplying a large and densely populated district with electricity for ever, subject to the right of the municipality to purchase the undertaking in forty-two years. By sect. 6 of the Provisional Order the undertakers are prohibited from constructing works outside the area of supply; it follows that the generating stations must be within the specified area; but it is notorious

* that every available spot within such area is surrounded [* 305] with houses, and if an injunction is granted the defendants may be prevented from carrying on their works. A difficulty arises from sect. 82 of the order, which provides that "nothing in this order" shall exempt the undertakers from proceedings for nuisance. The Provisional Order does not give any special immunity to the undertakers; but, on the other hand, the order is subject to the Act of 1882, and it does not override any immunity derived from the general Act. Sect. 82 was a general clause inserted, it may be, *ex abundanti cautela*, to guard against the special company being put into a more favourable position against the public than was provided by the general Act. The Provisional Order does not say that a nuisance shall not be committed. The power to commit the nuisance complained of in this case is necessarily implied from the provisions of the general Act, and is independent of the Provisional Order. We have an ever-increasing duty to perform in supplying electricity, and the Legislature must be presumed to have given us the powers necessary for the performance of our duty. This case falls within the principle of *London, Brighton, and South Coast Railway Company v. Truman*, 11 App. Cas. 45, and *National Telephone Company v. Baker* [1893], 2 Ch. 186.

[They also urged upon the Court the same arguments as they had addressed to the Court below upon the obligation on the defendants to exercise their powers for the benefit of the public, and the analogy of their position to that of a railway company.]

Warmington, Q. C., was only called upon for a reply as to the construction of the Electric Lighting Act, 1882:—

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The powers conferred by the Act of 1882 are subject to the conditions imposed upon the undertakers by the Provisional Order of 1890, which has the force of an Act of Parliament; and, by the 82nd clause of that order, nothing therein is to "exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them." This

condition puts the undertakers in precisely the same position as any other of Her Majesty's subjects. [He * referred to *Attorney-General v. Gaslight and Coke Company*, 7 Ch. D. 217; *Attorney-General v. Leeds Corporation*, L. R. 5 Ch. 583; *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193; *London, Brighton, and South Coast Railway Company v. Truman*; and *Bower and Webb on Electric Lighting*.]

The appeal in *Mear's Brewery Company, Limited, v. City of London Electric Lighting Company* was then heard.

[308] Warmington, Q. C., Badcock, and Waggett for the appellants:—

The reversioners had damages given to them in the Court below, only for structural injuries which could be seen; but they have had no relief in respect of the permanent depreciation of their property. They are entitled to an immediate injunction, and cannot be forced to lie by, whilst continuing and increasing injuries are destroying the value of their property, until a period arrives when it may be too late for an injunction to be of use to them, even if they could get it after such a lapse of time. *Bell v. Midland Railway Company*, 10 C. B. (N. S.) 287, 306; *Cooper v. Crabtree*, 20 Ch. D. 589; *Mayfair Property Company v. Johnston* [1894], 1 Ch. 508.

Renshaw, Q. C., and W. C. Braithwaite for the respondents, cited the following authorities: *Jones v. Chappell*, L. R. 20 Eq. 539; *Mott v. Shoolbred*, L. R. 20 Eq. 22; *Simpson v. Savage*, 1 C. B. (N. S.) 347, 26 L. J. C. P. 50; *Mumford v. Oxford, &c. Railway Company*, 1 H. & N. 34, 25 L. J. Ex. 265; *Cooper v. Crabtree*, 19 Ch. D. 193; *Rust v. Victoria Graving Dock Company*, 36 Ch. D. 113; *Whitham v. Kershaw*, 16 Q. B. D. 613.

Cur. adv. vult.

1894. Dec. 18. Lord HALSBURY:—

The plaintiffs in these two actions complain of a nuisance created by the defendants by the vibration of their engines, and the annoyance caused by the carrying on of their undertaking

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Of the reality and gravity of the nuisance no serious denial has been made before us. The plaintiffs in the two actions are respectively the lessee and reversioners of the house known as the Waterman's Arms. The considerations which arise are applicable to all the plaintiffs, except in so far as one is lessee and * the others are reversioners. I will deal with that [* 309] question separately.

The nuisance being established, it is said, first, that the defendant company are authorised by law to carry on their business, and that, as they have done all that skill and care can effect to prevent any nuisance, they are in the same position as a railway company, and are entitled to do what they have done under the authority of the Legislature. If the analogy were a correct one, I should think the defendants had fallen very far short in their proof that they had done all that was possible to prevent a nuisance. A railway company has a definite line of operation within which it may make its works, and, if it does all that can be done to prevent a nuisance in that place, the thing having to be done in that place, and by locomotive engines with the necessity of fire being carried along the railway, the Legislature is taken to have sanctioned that proceeding. No such considerations apply here, quite apart from the difference in the legislative enactments, with which I will deal presently. It is not, however, necessary to deal with this part of the case, and I only mention it to disclaim the notion that I acquiesce in the allegation that it has been proved that it is essential to the carrying on of the electric lighting business in the district in question that there should be a nuisance created.

The main question turns on the construction of the Electric Lighting Act, 1882, and the Provisional Order which has become an Act of Parliament. It was boldly contended by Mr. Moulton that the Provisional Order protected the undertaking, and that, if a nuisance were necessarily created by the carrying on of the company's undertaking, such nuisance was authorised and even imposed as a duty on the undertakers.

I think it is only necessary to read the Provisional Order in connection with the 10th section of the Electric Lighting Act, 1882, to dispose of that argument. The provision in the Act, so far as relates to powers under Provisional Orders, is in these words: "The undertakers may, subject to and in accordance with

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the provisions and restrictions of this Act, and of any rules made by the Board of Trade in pursuance of this Act, and of any license, order, or special Act authorising or affecting their [* 310] * undertaking, and for the purpose of supplying electricity, acquire such lands by agreement, construct such works, acquire such licenses for the use of any patented or protected processes, inventions, machinery, apparatus, methods, materials, or other things, enter into such contracts, and generally do all such acts and things as may be necessary and incidental to such supply." And then, in the order relied on for the authority to create the nuisance, come the words: "Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them." The general Act only gave them power subject, therefore, to the restrictions of the particular order, and the particular order makes them liable for nuisance.

I have also come to the conclusion that the powers given in the 17th section of the Act, when read together with the 32d section, are applicable to the execution of the works; and when one considers how frequently the distinction between the execution of the works and the use of them when executed has been the subject of comment and discussion, I think it must be taken that the language used has been deliberately chosen by the Legislature as pointing to the distinction, now well recognised, between the construction of works and the user of them when constructed.

But assuming that there is a nuisance, and that there is no authority justifying it, the question still remains, What is the relief to which the plaintiffs are entitled? But for the provision of Lord Cairns' Act, I suppose no one would have doubted that, in the state of facts I have now assumed to exist, the plaintiff, Shelfer, would have been entitled to an injunction to prevent the continuance of the nuisance. Lord KINGSDOWN, in the House of Lords (*Imperial Gas Light and Coke Company v. Broadbent*, 7 H. L. C. 600), has laid down the principle in words which comprehend such a case as this; he says (7 H. L. C. 612): "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law" (and, I presume, its violation); [* 311] "but when he has established his * right at law, I appre-

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hend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

But it is said, and truly said, that the law has been altered by Lord Cairns' Act, and the question is, What construction is to be placed upon that enactment? Undoubtedly it conferred upon Courts of equity the jurisdiction to award damages which did not exist before. But the question is, Did it mean to interfere with the well-settled principles upon which Courts of equity were in the habit of interfering in such cases as the present? It seems to me that the defects in the powers of the equity Courts which were sought to be supplied by that statute give ample grounds for the provisions of the statute, without supposing that it meant to revolutionise the principles upon which equitable jurisprudence had been administered up to that time. The language, of course, is general; the discretion given is necessarily wide enough in terms to authorise a Judge to award damages where formerly he would have given an injunction. But there is nothing in this case which, to my mind, can justify the Court in refusing to aid the legal rights established, by an injunction preventing the continuance of the nuisance. On the contrary, the effect of such a refusal in a case like the present would necessarily operate to enable a company who could afford it to drive a neighbouring proprietor to sell, whether he would or no, by continuing a nuisance, and simply paying damages for its continuance.

But, while I can agree with neither Mr. Warmington nor Mr. Moulton upon the alternative restrictions which they respectively seek to place upon the statute, I see no trace of any such intended alteration of the principles upon which equity should interfere with an injunction as would be involved in a refusal of an injunction here. And further, I think the question is here covered by authority, of which *Martin v. Price* [1894], 1 Ch. 276, in this Court, is the last example. For these reasons, I think the judgment of Mr. Justice KEKEWICH should be reversed as far as the refusal of an injunction is concerned, and that an injunction should be granted.

* The point which I have reserved for treatment in [*312] respect of Meux's action depends on their interest in the premises. They are reversioners, and the action by the reversioners can only be justified if the reversion is affected. But how

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is it possible to contend that the reversion is not affected if the walls of the house are so shaken by the nuisance in question that cracks are developed in the building, which experts consider will increase with the continuance, and, indeed, the increase, of the sources of vibration, by the erection of larger and more powerful engines?

I think there is ample evidence here of serious and permanent injury to the reversion by the continuance of the nuisance, and that, therefore, the same judgment ought to be given in respect of the reversion.

As the reversioners and the leaseholder represent the entire interest, it will be proper, in respect of the assessment of damages for past injuries, to see that the defendants are not made liable for the same damages twice over. The result is, that the appeal succeeds so far as the injunction is concerned, and that, therefore, the judgment of Mr. Justice KEKEWICH should be reversed in that respect, and the defendants should pay the costs.

LINDLEY, L. J. :—

The nuisance complained of in these actions is clearly proved as a fact. It is also proved that the nuisance is of a very serious character, and will continue and will increase if the defendants are allowed to enlarge their machinery and to extend their operations as they propose to do.

The persons who complain of this nuisance are (1) Shelfer, who is a lessee for twenty-one years and the occupier of a public-house near the defendants' works, and (2) Meux's Brewery Company, who are his lessors. Both ask for an injunction, and for damages for the injury already done. They have not joined in one action, as they might have done; but they have brought separate actions, which, however, came on for trial together.

The learned Judge has refused an injunction in both actions, and has simply directed an inquiry as to damages. From this decision the plaintiffs in both actions have appealed, and they ask for an injunction.

[* 313] * The defendants have not appealed: they do not, they say, object to pay damages or compensation; but they strongly object to an injunction; and in opposing an injunction their counsel have contended that the defendants have done no actionable wrong, that the statute which applies to them authorises, and indeed requires, them to supply electricity, and that

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the nuisance complained of is authorised by statute, and must therefore be submitted to by those who unfortunately suffer from it. It was contended by the plaintiffs that it was not open to the defendants to take this course without themselves appealing against the judgment for damages; but this contention cannot be supported. The defendants are entitled if they choose to waive their own right, if any, to appeal, and yet to resist the further relief which the plaintiffs seek to obtain against them.

The defendants' contention that the nuisance is authorised by Act of Parliament cannot be supported. This question turns on the Electric Lighting Act, 1882, ss. 10, 17, and on the Provisional Orders of 1890 and 1891 made under its authority. Those orders prescribe the conditions on which the defendants are entitled to exercise their statutory powers; and these orders expressly say that nothing in them shall justify a nuisance. Mr. Moulton's argument that the defendants can justify what they are doing under the Act of Parliament, although not under the orders, is, in my opinion, displaced by the wording of the Act and orders, which must be read together. When so read they do not legalise any nuisance. Part of the price paid for the right to exercise the statutory powers is that those who exercise them shall not create a nuisance.

Another answer to the defendants' contention on this head is that sects. 10 and 17 of the statute only relate to damage done in the execution of the company's works, and not to damage done afterwards by the use of engines the erection of which is completely finished.

I will add further that it is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. The evidence, as it stands, does not satisfy me that this is really true. The defendants have not proved that they cannot supply *electricity properly if they multiply their stations and [*314] diminish the power of their engines at each station. It is not shown that they cannot in this way avoid creating a nuisance at any of their stations.

The nuisance not being legalised, the question arises whether the plaintiffs are not entitled to an injunction. I will take the tenant's case, *Shelfer's*, first.

Before Lord Cairns' Act the tenant certainly would have been

 No. 2. — *Shelfer v. City of London Electric Lighting Co.*, 1895, 1 Ch. 314, 315.

entitled to an injunction to protect him during his tenancy. Nothing can be more explicit on this point than the judgment of the House of Lords in *Imperial Gas Light and Coke Company v. Broadbent*, 7 H. L. C. 600, where a market-gardener obtained an injunction against a gas company who injured his crops. Lord CAMPBELL, L. C., in the course of his judgment in that case, after saying that it was one in which the nuisance continued and had been aggravated, goes on (7 H. L. C. 610): "Then, under these circumstances, unless there is something peculiar in this case, it would be a matter of course to grant an injunction. . . . This is the very case for an injunction, because it is a case in which an action cannot sufficiently indemnify the party who is injured. . . . Then what is the great inconvenience that is to arise to the appellants? It is said that they have a duty to perform to the public. I consider that this is to be regarded as a mere commercial adventure; they have the liberty to make these works for their own profit, but no indictment would lie against them for omitting to do so; no action could be maintained against them if they could not supply gas." He adds that the appellants must either find out some mode by which they can carry on their works without injuring the plaintiff, or must limit their quantity of gas, and that he does not believe that the public will suffer from the injunction being maintained. Lord KINGSDOWN also, in his judgment, expresses himself thus (7 H. L. C. 612): "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right [* 315] at law, * I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

Lord CRANWORTH, moreover, in his judgment in this same case, says (7 D., M. & G. 436, 462): "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on."

This case is accordingly an authority to show that an injunction would not be refused on the ground that the public might be inconvenienced if an injunction were granted.

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But then it is urged that, although this was the law before Lord Cairns' Act, that Act has given the Court a discretion to award damages even in the case of a clear continuing nuisance of a serious character.

It is very true that Lord Cairns' Act (21 & 22 Vict., c. 27), s. 2, conferred upon the Court of Chancery jurisdiction which it had not before to award damages in lieu of an injunction. That section enacts that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . against the commission or continuance of any wrongful act . . . it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction. . . ."

The jurisdiction to give damages instead of an injunction is in words given in all cases; but the use of the word "damages" has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction. But in exercising the jurisdiction thus given, attention ought to be paid to well-settled principles; and ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalising wrongful acts; or, in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the * wrongdoer is able and willing to pay for the injury he [* 316] may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (*e.g.*, a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it. Courts of justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation. Lord Cairns' Act was not passed in order to supersede legislation for public purposes, but to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act. That this is the view which has always been taken of the Act is

plain from *Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R. 1 Ch. 349; *Clowes v. Staffordshire Potteries Waterworks Company*, L. R. 8 Ch. 125; *Krehl v. Burrell*, 7 Ch. D. 551, 11 Ch. D. 146; and *Martin v. Price* [1894], 1 Ch. 276, 285. In *Martin v. Price* the principle on which the Court ought to act was quite recently enunciated and enforced. The Court there said, in a carefully considered judgment, "The plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the Court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *primâ facie* right; but we can discover none in this case." In that case, accordingly, the Court of Appeal granted an injunction, which had been refused by the Court below, being of opinion that the discretion given to the Court by Lord Cairns' Act had been wrongly exercised. So here, guided by the same principles, I come to the same conclusion.

Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt [*317] to *specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy, — as where the acts complained of are already finished, — an injunction can be properly refused. There are no circumstances here which, according to recognised principles, justify the refusal of an injunction; and in my opinion, therefore, an injunction ought to have been granted in the action brought by the tenant.

I pass now to the action brought by Meux's Brewery Company, the landlords. They sue in respect of actual and prospective injury to their reversion. Actual injury is proved, for their house is structurally injured by the defendants' operations, and further prospective injury from continued and increased vibration

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is also proved. This is not the case of a temporary nuisance, which is likely to cease before the existing tenancy expires, and which nuisance, therefore, although it may affect the present value of the reversion, will not affect its value when it falls into possession. The nuisance is of a totally different character; and for such a permanent nuisance as this, and consequent permanent injury to the reversion, I have no doubt an action by the reversioner for damages would lie. The cases on this subject, from *Baxter v. Taylor*, 4 B. & Ad. 72, downwards, will be found collected in Mr. Justice NORTH's judgment in *Mayfair Property Company v. Johnston* [1894], 1 Ch. 516, and I do not, therefore, refer to them here.

It is true that in *Jones v. Chappell*, L. R. 20 Eq. 539, an injunction sought by a reversioner to restrain noise and vibration was refused; but it was refused because they might cease before the reversion came into possession. But in this case it is idle to suppose that the vibration, which is the real cause of the continuing injury, will cease. It must be borne in mind that the defendants are a corporation created for the express purpose of supplying electricity *for a time to which no [*318] limit can be assigned; and they have gone to great expense in making foundations and erecting permanent works on a large scale. *Jones v. Chappell*, L. R. 20 Eq. 539, may be compared with *Clowes v. Staffordshire Potteries Waterworks Company*, L. R. 8 Ch. 125. There a reversioner applied for an injunction to restrain the defendants from fouling a stream. The Vice-Chancellor MALINS refused the injunction, on the ground that the reversion was not materially or permanently injured, and that if it was, the plaintiff's remedy was for compensation under the defendants' special Acts. But on appeal this decision was reversed, and an injunction was granted, Lord Justice JAMES saying that the injunction was really a matter of course. This case arose after Lord Cairns' Act had come into operation. The common-law decisions show that an action by a reversioner for an injury to his reversion will lie if he can prove actual damage to his reversion, or, as some express it, an injury of such permanent nature as to be necessarily injurious to his reversion. Where this is proved, as it is here, a reversioner is, in my opinion, entitled to an injunction upon the principles which I have already explained. In *Meux's* action also, therefore, I think an injunction ought to have been granted.

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There ought to be one order on both appeals, varying the judgments appealed from by granting an injunction to restrain the defendants from carrying on their works so as to occasion a nuisance to the plaintiffs in either action. The form ought to be that adopted when landlord and tenant join in one action to have their respective interests protected. The defendants must pay the costs of the action brought by Meux's Brewery Company, and also the costs of these appeals.

The damages in Meux's Brewery Company's action ought to be referred to the same referee to whom the damages in Shelfer's action have been referred. This will protect the defendants from the risk of having to pay more than they ought in the aggregate.

A. L. SMITH, L. J. :—

I will first give judgment in the case of *Shelfer v. City of London Electric Lighting Company*.

[* 319] * I cannot agree to the proposition put forward by Mr. Warmington for the appellants, that under Lord Cairns' Act of 1858 (21 & 22 Vict., c. 27) jurisdiction is only given to the Court of Chancery to award damages in lieu of an injunction in those cases in which application is made for a mandatory injunction, and that there is no jurisdiction to do so if the object of the injunction is to prevent a continuing nuisance. It may well be, as stated by him, that only fourteen cases are to be found in the books since the year 1858, in which damages in lieu of an injunction have been awarded by the Court of Chancery, and that all these are cases in which mandatory injunctions were sought; but this constitutes no canon of construction whereby to interpret sect. 2 of the Act of 1858.

That section is in the widest possible terms, and I can find no limitation as to its applying only where the injunction sought is mandatory as distinguished from an injunction to prevent a continuing nuisance; and as regards jurisdiction, construing the section according to its plain English, I cannot doubt that the Court of Chancery has the power in the one case as in the other to award damages in substitution for an injunction.

The only binding authority which has placed a restricted construction upon the section is *Dreyfus v. Peruvian Guano Company*, 43 Ch. D. 316, in which it was held in this Court that for an injury, not yet committed, but only threatened, the Court of Chancery has no power to award damages.

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The present case is not for a threatened injury, but for a continuing nuisance existing at the date of the writ whereby damages have been, and still are being sustained.

That jurisdiction to award damages exists in the present case I cannot doubt; but whether it should be exercised in such a case is quite another question, and I will deal with that hereafter. It was argued on behalf of the defendants that even if they were committing the nuisance to the plaintiff and his family, as found by Mr. Justice KEKEWICH, no injunction could be granted against them, for that the combined effect of sects. 10 and 17 of the Electric Lighting Act, 1882 (45 & 46 Vict., c. 56), was to authorise their doing what they were, upon making full

* compensation to the plaintiff for all damage sustained [* 320] by him thereby.

In my judgment, this is not the true reading of these sections. Sect. 10, read in conjunction with the interpretation section (32), is confined to construction of the works required to supply electricity, and does not apply to their subsequent user; and sect. 17 is confined to payment of damages caused by the execution of such works, and does not apply to damages caused by their user. And, further, whatever be the true construction of these sections, the defendants were only authorised by the Act of 1882 to set up works and supply electricity subject to and in accordance with the provisions and restrictions of the order or special Act authorising or affecting their undertaking; and by the Provisional Order, confirmed by Act of Parliament, under which the defendants were authorised to erect works and supply electricity, it is expressly provided that nothing therein contained shall exonerate the defendants from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them.

This point of the defendants appears to me to be wholly untenable, and I agree in the conclusion Mr. Justice KEKEWICH arrived at thereon; and if authorities were wanted (though I think they are not) I refer to the cases cited at the Bar of *Attorney-General v. Gaslight and Coke Company*, 7 Ch. D. 217, and *Attorney-General v. Leeds Corporation*, L. R. 5 Ch. 583.

I now come to the question whether, in a case like the present, to award damages in substitution for an injunction is, or is not, an altogether erroneous exercise of the jurisdiction given by the section. Mr. Justice KEKEWICH has found, and these findings are

unappealed against, that the defendants were, at the date of action brought, creating a continuing nuisance by means of vibration, noise, and steam which were produced by the working of their plant and machinery, whereby not only annoyance, inconvenience, and personal discomfort were occasioned to the plaintiff, his wife and daughter, in the occupancy of their house, but the two latter had been, by the nuisance, made actually ill. There was also evidence that the defendants, by the erection of [* 321] *their works, had let down the buildings of the plaintiffs, which consequently cracked, and that the continuous vibration which subsequently arose from the user of their plant and machinery was constantly increasing and aggravating these cracks.

It was proved that the defendants were producing electricity by means of engines of from 4000 to 5000 horse-power, and that unless stopped by injunction they were about to increase their engine power to not less than at least 20,000 horse-power.

It appears to me, to use the words in the judgment of the Court in *Martin v. Price* [1894], 1 Ch. 276, 285, to which I was a party, that "the plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent," has been established, and that "the plaintiff is entitled to an injunction according to the ordinary principles upon which the Court is in the habit of acting in these cases."

Then what is there in this case to take it out of the ordinary rule?

There is no suggestion of any conduct on the plaintiff's part depriving him of his *primâ facie* right to an injunction.

Then why is it that Mr. Justice KEKEWICH awarded damages in the place of an injunction?

The learned Judge appears to have thought that, because the defendants at the trial had consented to abate the nuisance caused by steam, though not that caused by vibration and noise, damages were the proper remedy and adequate to compensate the plaintiff. But I would point out that the learned Judge himself stated in his judgment that he was unable to allot to the different matters complained of the part each took in creating the undoubted nuisance proved to exist, and the reasons he gives for awarding damages are as follows: "Having regard to the occupation not having been as a matter of money interfered with; having regard

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also to this, that the inconvenience is felt very much more at one part of the house than the other, almost exclusively, as regards a great part of the complaint in the upper floors; and having regard at any rate to the possibility of some inconvenience, and probably some loss of accommodation, of * making sleep- [* 322] ing arrangements elsewhere, which I suppose is possible; having regard also to the large inconvenience, to say no more, of stopping a business such as carried on by the defendants, — I think this is a case in which damages are a very fair compensation.”

It is here that I cannot agree with the learned Judge. Because the plaintiff does not suffer a money loss, and is only driven out of his upper floors, and has only to make arrangements for sleeping elsewhere, he, according to the Judge, is not entitled to stop the continuance of the nuisance, but damages are a very fair compensation.

Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.

In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *primâ facie* entitled to an injunction.

There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorised by this section.

In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction, the Court may award damages in its place. So, again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.

In my opinion, it may be stated as a good working rule that —

- (1.) If the injury to the plaintiff's legal rights is small,
- (2.) And is one which is capable of being estimated in money,
- (3.) And is one which can be adequately compensated by a small money payment,

[* 323] * (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction: —
then damages in substitution for an injunction may be given.

There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.

It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £15 might well be held to be not small but considerable; whereas a similar injury to a warehouse or other large building represented by ten times that amount might be held to be inconsiderable. Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception. In the present case it appears to me that the injury to the plaintiff is certainly not small, nor is it in my judgment capable of being estimated in money, or of being adequately compensated by a small money payment.

For nineteen years the plaintiff is saddled with his lease, and for that period, upon the hypothesis of the nuisance continuing, he is to suffer whatever annoyance, inconvenience, and personal discomfort other than by steam may be created by the user of the works of the defendants, and the cracks in the walls of the house already made by the defendants' works are to be increased, and it may be that his wife and daughter throughout that period are to continue to be made ill as heretofore. Can any one truly say that that is a small injury to the plaintiff's legal rights?

[* 324] * Moreover, how are these injuries to be put into money, and upon what principle are these damages to be assessed so as to represent the continuing injury to the plaintiff? To guess at them is not assessing them at all.

In order to constitute a real assessment it appears to me that the principle of purchasing the plaintiff's interest in his lease for

Nos. 1, 2. — *Dreyfus v. Peruvian Guano Co.*; *Shelfer v. City of London, &c. Co.* — Notes.

the unexpired term will have to be adopted as the basis upon which the assessment is to be made, and, as I have before stated, this is never sanctioned by the Court at the instance of a tortfeasor. The assessment upon the facts proved will manifestly not result in a small money payment.

In my judgment, for the reasons above, this is clearly not a case in which damages should be granted to the plaintiff in substitution for the injunction which he asks for, which is an injunction to restrain the continuance of the existing nuisance.

If the remedies the defendants are about to apply to the steam will abate the nuisance, well and good, and the injunction will not injure them; but if, on the other hand, a nuisance still continues, in my judgment this case is by no means brought within the exception to the ordinary rule, which I have endeavoured to express, and Mr. Justice KEKEWICH's judgment, wherein he awarded damages in substitution for an injunction, must be reversed, and an injunction as prayed for granted.

As regards the case of the reversioners, Meux's Brewery Company, that appears to me to give rise to a discussion of somewhat an academic description, so far as the defendants are concerned, assuming that an injunction is granted against them, as it is in the case of the tenant, Shelfer. It may, however, be of moment to the plaintiff reversioners, for the reasons pointed out by Mr. Warmington, and more especially as the works of the defendants, as regards engine power, are about to be enormously increased, which, obviously, will increase the present continuing injury to the fabric of the house. There is evidence that the defendants are committing, and are proposing to continue to commit, acts which are injurious to the fabric of the plaintiffs' house of a permanent character, and from which a jury would be well warranted in finding an injury to the reversioners.

* I agree with what Lord HALSBURY and Lord Justice [*325] LINDLEY have said upon these matters, and that an injunction should go in this case as in the case of the tenant.

For the reasons above given, these appeals must be allowed.

ENGLISH NOTES.

The former of the above cases is set forth merely on account of the lucid exposition by Lord Justice BOWEN of the principles for applying Lord Cairns' Act. In order, however, to show that the value

No. 3. — Duke of Bedford v. Trustees of British Museum, 2 My. & K. 552-575. — Rule.

of this exposition is in no way impaired by the circumstance of its being contained in a dissenting judgment, it seems necessary to set forth the facts and arguments, and at least one of the judgments of the majority.

It may be here observed, as mentioned in the judgment of Lord Justice BAGGALLAY in *Sayers v. Collyer*, No. 4, p. 101, *post*, that the nominal repeal of Lord Cairns' Act (21 & 22 Vict., c. 27), by its being included in the schedule to the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict., c. 49), in no way alters the principles established by the cases — these being preserved by sect. 5 of the last-mentioned Act.

AMERICAN NOTES.

Dreyfus v. Peruvian Guano Co. is cited in 1 Beach on Injunctions, p. 15, with no analogous American doctrine.

NO. 3. — DUKE OF BEDFORD *v.* TRUSTEES OF THE BRITISH MUSEUM.

(CH. 1822.)

NO. 4. — SAYERS *v.* COLLYER.

(C. A. 1884.)

RULE.

ALTERATION of circumstances is no answer to an action for an injunction to restrain a breach of covenant, unless due to the acts of the plaintiff.

The acquiescence of a plaintiff in a breach of covenant may be a bar to his remedy by injunction, and a reason for giving damages instead.

Duke of Bedford *v.* Trustees of the British Museum.

2 My. & K. 552-575.

This case is fully reported as No. 69 of "CONTRACT," 6 R. C. 702.

No. 4. — *Sayers v. Collyer*, 28 Ch. D. 103, 104.**Sayers v. Collyer.**

28 Ch. D. 103-110 (s. c. 54 L. J. Ch. 1; 51 L. T. 723; 33 W. R. 91).

[103] *Mutual Restrictive Covenants. — Building Estate. — Alteration of Character of Estate. — Acquiescence. — Lord Cairns' Act.*

A building estate was laid out in lots, which were sold by the owners of the estate to different purchasers, each of whom covenanted with the vendors and with the purchasers of the other lots entitled to the benefit of the covenant not to build a shop on his land, or to use his house as a shop, or to carry on any trade therein. The purchaser of one of the lots, who occupied his house as a private residence, brought an action against the purchaser of another lot, who was using his house as a beershop with an "off" license, to restrain him from breaking his covenant and for damages. The plaintiff had known for three years before the action was commenced that the defendant was using his house as a beershop, and had himself bought beer at the shop. There was evidence that some of the houses built on other lots had been for some time used as shops notwithstanding the covenant, and that some of the houses near the plaintiff's house were occupied, not each by a single tenant, but by two families at weekly rents.

Held, that the change in the character of the neighbourhood was not in itself a ground for refusing relief to the plaintiff, as the change was not caused by his conduct; but that the plaintiff had lost the right to enforce his covenant either by injunction or damages, through his acquiescence in the proceedings of the defendant.

Lord Cairns' Act (21 & 22 Vict., c. 27) is applicable to cases where the damage sustained by the plaintiff is only nominal, as well as to cases where he is entitled to substantial damages.

The repeal of Lord Cairns' Act by 46 & 47 Vict., c. 49, has not affected the jurisdiction of the Court.

Per FRY, L. J.: An amount of acquiescence on the part of the plaintiff which would not be sufficient to bar his action, may be sufficient to induce the Court to give damages instead of an injunction.

This was an appeal from a judgment of Mr. Justice PEARSON. (24 Ch. D. 180.)

The facts were shortly as follows:—

The British Land Company purchased an estate at Leytonstone, which they laid out in lots for building purposes and sold to different purchasers.

* By a deed dated the 28th of March, 1877, the com- [* 104] pany conveyed one of the lots, being No. 440 in a plan therein referred to, to George Upton in fee. The deed contained mutual covenants by the vendors and the purchaser that they and

No. 4. — *Sayers v. Collyer*, 28 Ch. D. 104, 105.

their respective heirs and assigns would perform the stipulations specified in the second schedule to the deed.

The schedule contained, among others, the following stipulations:—

“Trades, &c., prohibited. — No building shall be erected or used as a shop, workshop, warehouse, or factory, nor shall any trade or manufacture be carried on, nor any operative machinery be fixed or placed, nor any noxious or offensive process or deposit be carried on or made upon any lot.”

“Mutual covenants. — Each conveyance shall contain covenants by the vendor and purchaser to observe the above stipulations. The covenant of the purchaser (in respect of the land conveyed) shall be with the vendor and the other owners of the land to which the stipulations relate, and also as to lots 435 to 445 with the owners of lots 283 to 288 and 308 to 312 on the plan.”

By a deed dated the 28th of September, 1877, Upton conveyed part of lot 440, on which a house had been built, to the plaintiff in fee, subject to the restrictive covenants contained in the deed of the 28th of March, 1877. The plaintiff occupied this house as his private residence.

By a deed dated the 17th of April, 1878, the company conveyed lot 445 to Leonard Prevost in fee, subject to covenants and stipulations corresponding to those contained in the deed of March, 1877.

In April, 1879, the defendant agreed to purchase from Prevost lot 445, upon which a house, built to all appearance as a public-house or beershop, had been erected. Before the property was conveyed to him the defendant had notice of the restrictive covenants, but it was conveyed to him by a deed dated the 18th of April, 1879, without any restrictions whatever.

In May, 1879, the defendant obtained an “off” license for the sale of beer, and he then opened the house as a beershop and continued to use it as such, obtaining a renewal of his license from year to year.

[* 105] * On the 2nd of March, 1882, the plaintiff issued the writ in this action, claiming an injunction to restrain the defendant from so using the house, and from carrying on any other trade therein contrary to the covenants entered into by Prevost in the deed of the 17th of April, 1878. The plaintiff also claimed damages.

No. 4. — *Sayers v. Collyer*, 28 Ch. D. 105, 106.

The evidence showed that the plaintiff became aware of the use of the defendant's house as a beershop immediately after the defendant so opened it, and that he had in 1879 told the defendant's manager that he had no right so to use it; but the plaintiff took no steps to prevent the defendant from doing so till he commenced this action. The plaintiff himself had for some time bought beer at the defendant's shop. The plaintiff stated that the reason why he did not take proceedings against the defendant sooner was that he had mortgaged his own house, and the title deeds were in the possession of the mortgagee, and he did not know that he had any right to enforce the restrictive covenant until after he had in 1881 paid off his mortgage and consulted his solicitors. There was evidence that several of the houses subject to the restrictive covenant had been for about three years occupied as shops; and also that at the time of the trial most of the houses in the row of houses in which the plaintiff lived were occupied, not each by a single tenant, but each by two families paying weekly rents, the rents paid amounting to 8s. or 10s. per week for the whole of such house.

Mr. Justice PEARSON dismissed the action with costs; and from this judgment the plaintiff appealed.

Everitt, Q. C., and E. Ford, for the appellant: —

The plaintiff has a right to an injunction to enforce the restrictive covenants. The plaintiff has a legal right, and the defendant purchased with notice of the covenants. *Doherty v. Allman*, 3 App. Cas. 709, 719. The principle laid down in *Duke of Bedford v. Trustees of the British Museum*, 2 My. & K. 552, has no application to the present case, for whatever change may have taken place in the character of the neighbourhood was not caused by the plaintiff's conduct. Nor has there been such acquiescence on the part of the plaintiff as * to disentitle him to relief. He [* 106] did not in any way encourage the defendant to open the beershop, nor to lay out any money upon it. *Kemp v. Sober*, 1 Sim. (N. S.) 517; *London, Chatham, and Dover Railway Company v. Bull*, 47 L. T. (N. S.) 413; *Willmott v. Barber*, 15 Ch. D. 97. Mr. Justice PEARSON held that the Court had a discretion under Lord Cairns' Act (21 & 22 Viet., c. 27) to refuse an injunction and to grant damages instead; and then, being of opinion that the plaintiff had proved no actual damage, he refused relief altogether. But surely Lord Cairns' Act was not intended to apply to such a case as this. It can only be applicable to a case where substantial

damages are claimed. Here, what we want is a declaration of title, and to that we are entitled, although no substantial damage has been proved. Lord Cairns' Act has been repealed since the judgment in the case by the 46 & 47 Vict., c. 49, therefore no question arises under it on the appeal.

Cozens-Hardy, Q. C., and Farwell, for the defendant, were not called on.

BAGGALLAY, L. J., after stating the facts of the case, said :—

A number of cases have been cited in the course of the argument, but they are of very little importance for the decision of this case, except as enunciating the principles on which the Court ought to act, for each case must be determined according to its peculiar circumstances. The authorities establish the principle that there may be such an amount of acquiescence as may bar the right of a covenantee to enforce his covenants. I mean acquiescence as distinguished from delay, for a shorter period is sufficient to bar the enforcement of rights in the case of acquiescence than in a case of mere delay.

The question then here is, whether in the circumstances of the present case there has been such an amount of acquiescence as is sufficient to preclude the plaintiff from enforcing his covenant. In my opinion the evidence does show such an amount of acquiescence as bars the plaintiff from enforcing his rights. The sale of beer by the defendant began in 1879, only four doors from [* 107] *the house where the plaintiff lived, and went on till the commencement of the action. He was aware of the fact, and during some part of that period the plaintiff himself bought beer at the defendant's house. I can hardly imagine a stronger case of acquiescence than this. It was not a public-house in the ordinary sense of the words: the defendant sold beer to be drunk off the premises; people bought it and took it away to their own houses. Mr. Justice PEARSON appears to have held that the case fell under the doctrine of *Duke of Bedford v. Trustees of the British Museum*, 2 My. & K. 552, the character of the neighbourhood having been changed. But I do not take quite the same view of the case. Within certain limits, no doubt, that authority has an application to the present case, but I do not decide it upon that ground. I prefer to base my decision on the ground of acquiescence on the part of the plaintiff.

Mr. Justice PEARSON also thought that in consequence of the

No. 4. — *Sayers v. Collyer*, 28 Ch. D. 107, 108.

change of condition of the neighbourhood he ought not to grant the injunction, but that the Court had a discretion under Lord Cairns' Act to grant damages instead of an injunction; and being of opinion that the plaintiff had sustained no substantial damage he dismissed the action altogether. Various comments have been addressed to us on Lord Cairns' Act; and it has been contended that it is not applicable to cases where the damages are nominal only. I cannot accede to that view. If it were so held, the result would follow that if a plaintiff had sustained damage to the extent of £20 the Act would apply, but if he had sustained only nominal damage it would not apply, and the plaintiff would be entitled to an injunction. This is surely inconsistent with the purposes of the Act.

Our attention was called to the fact that Lord Cairns' Act had been repealed since the former hearing of this case, being included in the schedules to the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict., c. 49), but that Act contains words preserving the jurisdiction of the Court notwithstanding the repeal. By sect. 5 it is enacted that any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the Act shall * not be affected by the repeal. It is not, however, [* 108] necessary to have recourse to Lord Cairns' Act, for it is clear that the Court now has power to give damages as alternative relief. Before Lord Cairns' Act was passed a plaintiff who wished to enforce a restrictive covenant had two remedies; he might come into a Court of equity for an injunction to restrain an infringement of his right, or he might have recourse to a Court of common law to obtain damages, and Lord Cairns' Act gives the Courts of equity the power of giving a plaintiff damages by way of alternative relief. But since the Judicature Acts each division of the Court has full power, apart from Lord Cairns' Act, to give either an injunction or damages.

I refer to that point only because it was dwelt on in the argument; but the ground of my decision is that there has been such an amount of acquiescence in the present case as to bar the plaintiff from enforcing his covenant. The appeal must, therefore, be dismissed.

BOWEN, L. J. : —

I agree that the true ground for deciding this case is not the

mere fact of an alteration in the proprietary character of the neighbourhood. The case of *Duke of Bedford v. Trustees of the British Museum*, 2 My. & K. 552, must not be misunderstood or misapplied. It did not decide that contractual obligations disappeared as circumstances changed; but that a person who is entitled to the benefit of a restrictive covenant may, by his conduct or omissions, put himself in such an altered relation to the person bound by it as makes it manifestly unjust for him to ask a Court to insist on its enforcement by injunction. It was decided on equitable grounds that in such case there would be an equity against the plaintiff which would bar that particular relief. In the present case we do not decide that a mere alteration in the character of the neighbourhood would be sufficient; because there is no evidence that such alteration was caused by the plaintiff. But the true ground of our decision is that the plaintiff's conduct amounts to acquiescence. He has no right to come here for an injunction after the way in which he has behaved towards the defendant.

[*109] Mr. Justice PEARSON dealt with the case under Lord Cairns' Act. He held that it was a case in which he ought to refuse an injunction, but had a right under that Act to grant damages instead; and as he assessed the damages at one farthing, he dismissed the action altogether. The counsel for the appellant complained of this treatment of the case by the learned Judge; they said that the Court elected to treat the case as one of damages, and then gave no damages at all; and they contend that the Act did not apply to such a case as that. But it is obvious that the Act applies with double force to cases where only nominal damages could be given. Otherwise this absurd result would follow, that if a plaintiff is entitled to substantial damages the Court could refuse him an injunction, but if he had no real cause of complaint he would have a right to an injunction. In other words, as his damages decreased to zero, his right to an injunction would correspondingly increase. That is so absurd a proposition that I cannot believe that it was intended by the Legislature. I think, therefore, that Mr. Justice PEARSON was right in treating the case as coming under Lord Cairns' Act. I doubted at first, whether he ought not to have given nominal damages and no costs. But my doubt has been removed by the consideration that a plaintiff will not be saved from having his action dismissed with costs unless he has suffered tangible damage, or unless he is justi-

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fied in bringing his action to ask for a declaration of title, or to try a right. But here the plaintiff has suffered no material damage, and he has no right to bring an action and ask for a declaration of title against the present defendant. If he had not behaved to the defendant as he did, there is no reason why he should not have had his right declared by the Court. But the acquiescence which disentitles him to an injunction also precludes him from obtaining a declaration of title, and makes it a frivolous action. I think, therefore, Mr. Justice PEARSON was right in dismissing the action.

FRY, L. J.:—

I concur in what has been said on the first question; I agree that the rule in *Duke of Bedford v. Trustees of the British Museum*, 2 My. & K. 552, is not applicable to this case. It applies where an * alteration takes place through the acts [* 110] or permission of the plaintiff, or those under whom he claims, so that his enforcing his covenant becomes unreasonable. But I do not think that it applies to cases where the change which has taken place was beyond the control and independent of the action of the plaintiff. Therefore I think, although we have not heard the respondent on the point, that the learned Judge was not right in applying the principle of that case to the present.

But I agree that the action must be dismissed on the ground of the acquiescence of the plaintiff. Acquiescence may either be an entire bar to all relief, or it may be a ground for inducing the Court to act under the powers of Lord Cairns' Act. Although I do not differ from what has been said by Lord Justice BAGGALLAY, I am inclined to prefer the other ground, and think that this is a case in which the plaintiff's acquiescence would have induced me to give damages instead of an injunction. It was argued that Lord Cairns' Act is not applicable to cases where nominal damages only could be given, but only to cases where the damages are substantial. It would be extraordinary if, as Lord Justice BOWEN said, the effect of the Act were to be that the right to an injunction increased as the right to damages decreased, and that the right to an injunction became absolute when the damages were zero. In my opinion the Act applies to cases where the damages are merely nominal. And I am clearly of opinion that acquiescence is one of those circumstances which the Court may take

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into consideration in deciding whether it should give damages or an injunction; and that an amount of acquiescence less than what would be a bar to all remedy, may operate on the discretion of the Court, and induce it to give damages instead of an injunction.

Therefore, without differing from the other Lords Justices, I prefer to rest my decision on that ground.

ENGLISH NOTES.

To induce the Court to refuse a mandatory injunction and give damages instead, delay to take proceedings, or standing by without protest, while the alleged mischief is being openly done, although not amounting to acquiescence, may be sufficient; if the result of a mandatory injunction would be to cause very serious loss on the one side, and the damage on the other is comparatively trifling. *Durell v. Pritchard* (1865), L. R. 1 Ch. 244, 35 L. J. Ch. 223. But on the other hand the Court will allow no consideration in favour of a person who hurries on works to the detriment of his neighbour, or avoids service of a writ with the view of gaining an advantage. See notes to *Newson v. Pender*, 3 R. C. 74; *Von Joel v. Hornsey* (C. A. 1895), 1895, 2 Ch. 774, 65 L. J. Ch. 102, 73 L. T. 372.

AMERICAN NOTES.

The *Duke of Bedford's Case* is cited in 2 High on Injunctions, sect. 1158, 1 Story's Eq. Jur., sect. 737; *Sayers v. Collier* is cited in Rawle on Covenants, p. 606; in Beach on Injunctions, p. 16; and both are cited in an extended note, 21 Am. St. Rep. 496.

The doctrine of *Sayers v. Collyer* may be found in *St. Andrew's Church's Appeal*, 67 Penn. State, 512; *Orne v. Fridenberg*, 143 ibid. 487; 24 Am. St. Rep. 567 (where the covenantee saw the covenantor erecting an offending structure and did not object; such also was the case of *Water-Lot Co. v. Bucks*, 5 Georgia, 315, a very learned discussion). And in *Peters v. Delaplaine*, 49 New York, 362, specific performance was refused where the vendee had delayed seventeen years, and the situation of the parties and the condition of and value of the property had greatly changed. So in *Taylor v. Longworth*, 14 Peters (U. S. Sup. Ct.), 174, STORY, J., said: "If the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has been, in the intermediate period, a material change of circumstances, affecting the rights, interests, or obligations of the parties; in all such cases Courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust." The case last cited is cited and followed in *Pomeroy v. Fullerton*, 131 Missouri, 592, and the language of STORY above quoted is declared by MILLER, J., in *Holgate v. Eaton*, 116 United States, 40.

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to have "become a legal maxim in this class of cases." *Gawtry v. Leland*, 40 New Jersey Equity, 323, seems rather to the contrary of *Sayers v. Collier*.

In the leading case of *Trustees of Columbia College v. Thacher*, 87 New York, 311; 41 Am. Rep. 365 (cited with emphasis in 3 Pomeroy's Eq. Jur. sect. 1295), the Court refused specific performance of a covenant against erecting trade buildings, for the reason that the value of the premises for any other purposes was greatly impaired by the advance of business and the erection of an elevated railway. So in *Amerman v. Deane*, 132 New York, 355; 28 Am. St. Rep. 584; *Zipp v. Barker*, New York (to appear).

In *McBryde v. Sayer*, 86 Alabama, 458; 3 Lawyers' Rep. Annotated, 861, it was held that a grant of "right of way as now provided and used from the street to the hall," on the third floor of a building, will not be protected by injunction after the hall, which was at that time used for public entertainments, has been cut up into rooms and let to societies, of mixed membership, amounting to from 500 to 1000, and which hold meetings from four to six nights a week, when the complainants can, at relatively small outlay, re-establish on their own premises a stairway which formerly led to the hall. "What we decide is that its use had become oppressive to them" (defendants), "and Chancery will not aid the complainants in its re-establishment. It leaves them to such redress as they can obtain in a Court of law." Citing *Columbia College v. Thacher*, *supra*.

The New York Court, however, distinguished the last-cited case in *Rowland v. Miller*, 139 New York, 93; 22 Lawyers' Rep. Annotated, 182, where a covenant against carrying on an offensive business was enforced on the complaint of one who still occupied his lot as a residence, although most of the other lots in question had been given over to trade. (The business here complained of was that of an undertaker.) The *Columbia College Case* was there distinguished on the ground that "the contract which the plaintiff sought to enforce was no longer of any value to it, and that its enforcement would result in great damage to the defendant, without any benefit to any one. Here the plaintiff has the right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement."

In *Jenks v. Pawlowski*, 98 Michigan, 110; 22 Lawyers' Rep. Annotated, 863, the Court refused to enforce a covenant against selling intoxicating liquors on the premises, on the ground that the grantor had sold the other adjoining premises without such restriction, and such liquors were sold on them, and the reason of the restriction, namely, the diminution of the value of the remaining land and the impairment of its eligibility for other uses, having thus failed, and the value of the lot in question having been thus impaired by the grantor's own act, the mutuality of contract was destroyed. Much the same principle is laid down in *Duncan v. Railway Co.*, 85 Kentucky, 525, citing the principal case, No. 3.

A valuable, and the most recent, adjudication on this point in this country is *Landell v. Hamilton*, 175 Penn. State, 327, where there was a restriction on building on the lots conveyed within five feet of the street line, and on the height of buildings. At the time of the conveyance the neighborhood was confined to residences, but afterwards was given over exclusively to business.

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The Court enforced the restrictions, observing : "The purpose to afford air and light to the dominant lots could only be accomplished by an unlimited, as to time, restriction ; and there is nothing to indicate that a change in the nature of the occupancy should affect the expressed right under the covenant. It is probable that deprivation of air is less endurable to the occupants of a dwelling than to those of a store or factory ; and generally the latter are less disposed to resist such deprivation ; but these elements promote the health and comfort of one class of occupants as fully as the other, and both have the same right to insist on a restriction for their protection. No such change in the use of the land as appears here has ever been held destructive of the original covenant in any of the adjudicated cases in this State ; nor in our opinion can such judgment be sustained on sound legal principles."

"We concede, some of the cases decided in other States are in apparent conflict with our decision. But what this Court has uniformly held, and now holds, is, that where the restriction, notwithstanding the change of use of the land and buildings, still is of substantial value to the dominant lot, equity will restrain its violation, if relief, as here, is promptly sought. There may be and doubtless will occur cases where the restriction has ceased to be of any advantage. In such cases, equity would not interpose and retard improvements simply to sustain the literal observance of a condition or covenant. And three of the cases relied on by appellees are of this very character, and therefore clearly distinguishable from the one before us. In *Columbia College v. Thacher*, 87 N. Y. R. 311, the agreement was between owners of dwelling-houses, that one of them would not erect, carry on, or establish any stable, school-house, engine-house, community-house, or any kind of a manufactory, trade, or business whatsoever on the land. His grantees opened up and carried on many kinds of business in violation of the original covenant. The purpose of the covenant was manifestly to secure privacy and freedom from noise in the dwelling-houses. But by the construction of an elevated railroad its desirability for dwellings had been practically destroyed ; privacy and quiet could no longer be enjoyed ; the Court refused to enjoin the use of the land for business and manufacturing purposes, because, by the change consequent upon the construction and operation of the railroad, the purpose of the restriction had been defeated. Equity would not lend its aid to the enforcement of a mere legal right, where no damage resulted to plaintiff from non-enforcement.

"In *Page v. Murray*, 46 N. J. Eq. Rep. 325, the restriction was to protect the land from cheap tenement buildings, and encourage its occupation by a superior class of residents. To this end it provided that, for a period of twenty years, no building should be erected costing less than \$3,000, and no hotel, tavern, lager-beer saloon, livery stable, etc., should be erected thereon. In the meantime, buildings of a low class had been erected in all the surrounding neighborhood. The purpose to make the land desirable for another class of occupants was thereby defeated, and this, together with the fact that the twenty years' term had nearly expired, induced the Court to refuse an injunction to restrain violation of the condition. The Court would not enjoin that which could not damage the plaintiff.

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“ In *Jewell v. Lee*, 96 Mass. 145, there was a condition in the grant that the land bordering on the ocean should be used for no other purpose than access to the water for bathing and boating, and low bath-houses. It was held from the facts in that case that the intention of the grantor was to create a restriction in favor of adjoining land which he continued to hold; that as this land had passed to other grantees in separate lots, they could not insist on a restriction personal to the original grantor, and the Court says: ‘ Where it is apparent the condition was annexed to a grant for the purpose of improving or rendering more beneficial and advantageous the occupation of the estate granted, when it should become divided into separate parcels, and be owned by different individuals, or when the manifest object of the restriction on the use of an estate was to benefit another tract adjoining to or in the vicinity of the land on which the restriction is imposed,’ equitable relief will be afforded.”

The New Jersey case above cited relies on the principal case, No. 3, and that case is also cited in *Jackson v. Stevenson*, 156 Massachusetts, 496; 32 Am. St. Rep. 476, to the statement: “ It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that owing to the general growth of the city and the present use of the whole neighborhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions,” etc. To the same effect *Brown v. Paine*, Illinois Super. Ct., 27 Chicago Legal News, 74.

Although the decision in *Orne v. Fridenberg*, 143 Penn. State, 487; 24 Am. St. Rep. 567, was put on the ground of acquiescence, yet the Court said: “ Were it necessary to go further, a strong argument might be made against awarding the injunction by reason of the changed circumstances. . . . The location is no longer a residential neighborhood. . . . This entire change of circumstances and surroundings might well make a Chancellor hesitate ere he applied the strong arm of an injunction.” Citing *Sayers v. Collyer* and *Trustees of Columbia College v. Thacher*.

 No. 6. — **Griffith v. Blake**, 27 Ch. D. 474. — Rule.

No. 5. — **NEWSON v. PENDER.**

(C. A. 1884.)

No. 6. — **GRIFFITH v. BLAKE.**

(C. A. 1884.)

RULE.

THE granting or refusal of an interlocutory injunction is determined by the balance of convenience in maintaining matters *in statu quo* or postponing the adjustment of rights until the hearing.

Where the plaintiff obtains an interlocutory injunction, upon giving the usual undertaking as to damages, the defendant is entitled to the benefit of that undertaking, even although it should afterwards be decided that the injunction was wrongly granted, owing to the mistake of the Court itself.

Newson v. Pender.

27 Ch. D. 43-65 (s. c. 52 L. T. 9; 33 W. R. 243).

This case is fully reported as No. 5 of "ANCIENT LIGHT," 3 R. C. 57.

Griffith v. Blake.

27 Ch. D. 474-477 (s. c. 53 L. J. Ch. 965; 51 L. T. 274; 32 W. R. 833).

[474] *Interlocutory Injunction. — Undertaking as to Damages.*

Per BAGGALLAY, COTTON, and LINDLEY, L. JJ., where an interlocutory injunction has been granted on the usual undertaking as to damages, if it afterwards is established at the trial that the plaintiff is not entitled to an injunction, an inquiry as to damages may be directed, though the plaintiff was not guilty of misrepresentation, suppression, or other default in obtaining the injunction.

This was an appeal by the defendants from an interim injunction granted by Mr. Justice CHITTY to restrain the defendants from carrying on their business so as to occasion a nuisance by noise to the plaintiffs.

The plaintiffs were solicitors, and occupied as offices the ground floor of a newly erected building in the Station Approach, Cardiff. A few months after they had taken possession, the defendants, who were ironmongers and tinplate workers, became, about the end of 1882, occupiers of an adjoining house, which they used for the purposes of their trade. The present action was commenced on the 20th of March, 1884, the ground of complaint being that the defendants carried on processes which caused such noise and vibration in the plaintiffs' offices as materially to interfere with the carrying on of the plaintiffs' business. The defendants, it appeared, had given a notice to quit, which would expire in July, 1884.

The plaintiffs on the 9th of May moved for an injunction before Mr. Justice CHITTY, and his Lordship said that the Court ought not to grant the injunction unless it was reasonably satisfied that the plaintiffs' case would be sustained at the trial, *and that it might turn out when the witnesses were [* 475] seen that the facts would assume a different complexion; but the Court must decide on the evidence now before it. His Lordship then examined the evidence, and stated his conclusion to be, that there was noise created by the defendants' operations to that degree which the law considered to be a nuisance. His Lordship, therefore, granted an injunction, the plaintiffs undertaking to abide by any order the Court might make as to damages, in case the Court should thereafter be of opinion that the defendants had sustained any by reason of the order, which the plaintiffs ought to pay.

The defendants appealed, and the appeal was heard on the 2nd of July, 1884.

Seward Brice, for the appellants: —

The uniform course of the Court has been not to grant an interlocutory injunction which will stop a going trade. *Attorney-General v. Charles*, 11 W. R. 253; *Eaden v. Firth*, 1 H. & M. 573. The nuisance is not sufficient to justify an injunction, for though the doctrine that a person who comes to a nuisance cannot complain, is now exploded, regard is to be had to the character of the neighbourhood. *St. Helen's Smelting Company v. Tipping*, 11 H. L. C. 642. *Crumph v. Lambert*, L. R. 3 Eq. 409, shows that in a case like the present an injunction might be granted at the trial if the case of nuisance from noise were made out, but the

Court will not grant it on motion when it will stop a trade. Having regard to the decision in *Smith v. Day*, 21 Ch. D. 421, that the undertaking as to damages only applies where the plaintiff has acted improperly in obtaining the injunction, the undertaking will be no protection to us, if it turns out at the hearing that the injunction ought not to have been granted, but that the plaintiffs were free from blame in obtaining it.

[COTTON, L. J. — That was not a decision, it was an expression of opinion by the late MASTER OF THE ROLLS, dissented from by myself, and not adopted by the other Judge.]

[* 476] * Romer, Q. C., and Beale, *contra*, were not called upon.

BAGGALLAY, L. J. :—

The question to be decided at the trial will be whether the noise caused by carrying on the defendants' business occasions so much annoyance to the plaintiffs as to amount in law to a nuisance. Mr. Justice CHITTY has said that to entitle the plaintiff to obtain an injunction now, the Court must be reasonably satisfied that he will succeed at the trial, but I should rather put it that he must make a strong *primâ facie* case that he will succeed at the trial. There is evidence on both sides as to the amount of noise, but I think that a *primâ facie* case of nuisance is made out. The defendants were asked whether they would give an undertaking not to carry on their business in such a way as to cause a nuisance to the plaintiffs, and they declined to give it. The effect of their giving it would not have been very different from that of an injunction, but their declining to give it does not give a favourable impression of their case. The defendants have given notice to quit their premises, so that in a short time any inconvenience occasioned to them by the injunction will cease. This injunction was obtained by the plaintiffs on the usual undertaking as to damages; and if it turns out that the injunction ought not to have been granted, the defendants will get full compensation by means of the undertaking for the temporary damage they will have sustained. I cannot concur in the opinion expressed by the late MASTER OF THE ROLLS in *Smith v. Day*, 21 Ch. D. 421. It was a *dictum* distinctly dissented from by the Lord Justice COTTON at the time, and the present MASTER OF THE ROLLS declined to give any opinion on the point. I cannot adopt the view of the late MASTER OF THE ROLLS. If the defendants turn out to be right, it appears to me that they can, under the undertaking,

obtain compensation for all injury sustained by them from the granting of the injunction.

COTTON, L. J. : —

I am of the same opinion. There is a conflict of evidence, and we cannot now fully decide the question whether there is a * nuisance, but in my opinion the plaintiffs have made out [* 477] a *prima facie* case. The defendants, however, urge that the Court will not on motion stop a business. No doubt the Court is reluctant to interfere summarily with a business which is being carried on and intended to be carried on, but here the defendants are leaving in three weeks, so that their business will only be interfered with for a short period, and if they turn out to be in the right they will get compensation under the undertaking as to damages. The defendants refer to *Smith v. Day*, 21 Ch. D. 421, as being an authority the other way. The late MASTER OF THE ROLLS there expressed an opinion that there ought not to be an inquiry as to damages unless the plaintiff had been guilty of some default in obtaining the injunction. Probably he did not mean his remarks to apply to a case like this, where, if the injunction was improperly granted, it would be, not because the Judge made a mistake, but because the plaintiffs' evidence was not true. But I am of opinion that his *dictum* is not well founded, and that the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary.

LINDLEY, L. J. : —

I am of the same opinion. I think that the evidence of nuisance is strong, and that if the plaintiffs ultimately fail, the defendants can obtain under the undertaking full compensation for the injury done to them by the injunction. I agree with the observations of the other members of the Court in *Smith v. Day*. My opinion is that the undertaking applies in all cases where the Court at the hearing determines that the plaintiff is not entitled to an injunction. The *dictum* of the late MASTER OF THE ROLLS is not consistent with what was done by the Court of Appeal in *Novello v. James*, 5 D., M. & G. 876, and *Newby v. Harrison*, 3 D., F. & J. 287.

ENGLISH NOTES.

It seems unnecessary to multiply instances of a rule the application of which must in every case depend upon the special circumstances.

Nos. 5, 6. — *Newson v. Pender* ; *Griffith v. Blake*. — Notes.

Some important points as to the granting of an interlocutory injunction will be found in the notes to *Newson v. Pender*, No. 5 of "Ancient Light," 3 R. C. 74.

Where a sufficient undertaking is given before the hearing of a motion, it has been held unnecessary to grant a formal injunction; but the plaintiff is entitled to have the undertaking given in Court. The costs of any unnecessary steps taken in the action after the undertaking has been offered will fall upon the plaintiff. *Jenkins v. Hope* (NORTH, J., 1895), 1896, 1 Ch. 278, 65 L. J. Ch. 249, 73 L. T. 705, 44 W. R. 358.

AMERICAN NOTES.

Griffith v. Blake is cited in 1 Beach on Injunctions, sect. 220.

The statement of the first branch of the Rule probably expresses the American doctrine. The granting or the refusal is a matter of pure discretion. 1 Beach on Injunctions, sect. 117. It has been so held even where the object of the action may be defeated by the refusal: *Young v. Campbell*, 75 New York, 525; and where the action of the Court appeared to be one of indiscretion rather than discretion.

In *Rend v. Venture Oil Co.*, 48 Federal Reporter, 248, the Court said: "There are certain well-settled rules regulating the granting of preliminary injunctions which must govern in passing upon this motion. They are that the complainant must show a clear legal or equitable interest or right which is to be protected; that there must be a well-grounded apprehension of immediate injury to those rights or interests, and a clear necessity must be shown of immediate protection to such interest or right which would otherwise be seriously injured or impaired. If it appears that the preliminary injunction is not necessary to preserve interests or property *in statu quo* until final hearing, and the rights of the complainant will suffer no serious injury until that time, or that the injury threatened is of such a nature that it can be remedied on final hearing, then the injunction ought not to be granted. And so if it appears that the complainant's rights are not sufficiently clear, and the considerations of respective convenience or inconvenience to parties complainant and defendant, when balanced, show that serious injury may be done to the defendant by the granting of the injunction, and no serious injury will be done to complainant by withholding it until final hearing, then the injunction ought not to be granted. Other considerations may have at times been held as controlling in special cases; but the general rules, as I have stated, are those which have been held as governing the discretion which is to be exercised in passing upon such motions."

Mr. Beach says (1 Inj., sect. 118): "Such discretion will often be influenced by a consideration of the relative injury and inconvenience likely to result to the parties from granting or refusing the injunction." "It is an established principle of equity jurisprudence, that if there is more probability that more wrong will be done than prevented by the injunction prayed for, it will not be granted." *Fesler v. Brayton*, 145 Indiana, 71; 32 Lawyers' Rep. Annotated, 578. The Court said: "It is not apparent that any special beneficial results

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will inure to the appellee if the statute in question should be adjudged to be invalid; while upon the other hand, injurious ones might result to the public; hence, under such circumstances, it is evident that equitable rules do not require a Court to award the relief requested by the appellee. It is true, as contended by the eminent and learned counsel for the latter, as a general proposition, that Courts have nothing to do with the consequences that follow from their decisions; yet under the state of facts in this cause, the question of the probable results that the public may sustain if a decision should be adverse to the statute in dispute becomes a potent factor in deciding whether the relief sought by the action should be granted."

Mr. High says (1 Inj., sect. 13), citing English cases, and *Hackensack Imp. Co. v. New Jersey M. R. Co.*, 22 New Jersey Eq. 94; *McCorkle v. Brem*, 76 North Carolina, 407; *Olmstead v. Koester*, 14 Kansas, 463: "Where the legal right is not sufficiently clear to enable a Court of equity to form an opinion, it will generally be governed in deciding an application for a preliminary injunction by considerations of the relative convenience and inconvenience which may result to the parties from granting or withholding the writ. And where upon balancing such considerations, it is apparent that the act complained of is likely to result in irreparable injury to complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted. But where upon the other hand, it appears that greater danger is likely to result from granting than from withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will be refused and the parties left as they are until the legal right can be determined at law. And if plaintiff's rights may be as well secured by a final injunction, and are not prejudiced by a refusal of the temporary injunction, the Court may refuse the interlocutory application, especially when the injuries which would result to defendant if the relief were improperly granted would greatly exceed the benefits which might result to plaintiff if the injunction were properly granted. If however a clear case of irreparable injury is shown as likely to result to complainant unless the injunction is granted, and it does not appear that the issuing of the writ will work any such injury to defendants, the relief will be granted."

"The right to an injunction is not *ex debito justitiæ*, but such application is addressed to the sound conscience of the Chancellor, acting upon all the circumstances of the case." *Reddall v. Bryan*, 14 Maryland, 476. "An injunction is not of right. It will not be issued when upon a broad consideration of the situation of all the parties good conscience does not require it." *Heilman v. Lebanon, &c. Ry. Co.*, 175 Penn. State, 199. (So the injunction was denied because the plaintiff had delayed until two years after completion of the railroad.)

It is a cardinal rule that where the injuries which would result to the defendant, if the relief were improperly granted, would greatly exceed the benefits which might result to the plaintiff, if the injunction were properly granted, the writ should be refused. *Olmstead v. Koester*, 14 Kansas, 463; *McBryde v. Sayer*, 86 Alabama, 458; 3 Lawyers' Rep. Annotated, 861.

By statute in this country appeals are generally allowed from orders granting or refusing interlocutory injunctions; but the general holding is that the exercise of discretion in this respect will not be interfered with unless there be a grave and evident abuse of it.

No. 1. — **Bennett v. Mellor**, 5 T. R. 273. — Rule.

INNKEEPER.

SECTION I. Liability.

SECTION II. Lien.

SECTION I. — *Liability*.

No. 1. — **BENNETT v. MELLOR**.

(K. B. 1793.)

No. 2. — **STRAUSS v. COUNTY HOTEL AND WINE COMPANY**.

(Q. B. D. 1883.)

RULE.

THE liability of an innkeeper for goods brought to an inn is limited to those cases in which the relation of landlord and guest exists.

Bennett v. Mellor.

5 Term Reports, 273-276 (2 R. R. 593).

Innkeeper. — Property of Guest. — Liability.

[273] If an innkeeper refuse to take charge of goods till a future day because his house is full of parcels, still he is liable to make good the loss if the owner stop as a guest, and the goods be stolen during his stay.

The defendant was an innkeeper, against whom the plaintiff brought his action for the value of goods stolen out of the inn. At the trial before BULLER, J., at the last Lancaster Assizes, it appeared that the plaintiff's servant had taken the goods in question to market at Manchester, and not being able to dispose of them went with them to the defendant's inn, and asked the defendant's wife if he could leave the goods there till the week following (meaning the next market day); she said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn, had some liquor, and put the goods on the floor

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immediately behind him. When he got up, after sitting there a little while, the goods were missing. A verdict was found for the plaintiff; and in reporting this * case upon a motion for a new trial, BULLER, J., observed that he was of opinion that if the defendant's wife had accepted the charge of the goods upon the special request made to her, he should have considered her as a special bailee, and not answerable in this case, having been guilty of no actual negligence; but that not being the case, he considered this to be the common case of goods brought into an inn by a guest, and stolen from thence, in which case the innkeeper was liable to make good the loss.

Walton showed cause against a rule for setting aside the verdict. An innkeeper is by the common law liable to answer for all goods lodged in his inn by his guest: 42 Edw. III., 11 a; *Calye's Case*, 8 Co. Rep. 32; and in the latter case it was even held that the innkeeper cannot discharge himself from such liability by alleging that he left the goods under the special care of the guest himself, by delivering to him the key of the chamber in which they were locked. Neither is this protection confined to the goods of persons going to and continuing in the inn as guests; for if a person carry a horse to an inn and there leave him, the innkeeper is liable to make good any loss. *York v. Grindston*, Salk. 388, 2 Ld. Ray. 868. It appears also from *Calye's Case* that it is not necessary to prove negligence in the innkeeper in order to charge him for the loss of the goods in the inn; but he must discharge himself by showing negligence or fraud in the guest. Now here no negligence can be imputed to the defendant, for he put the goods close behind his chair.

Law and Topping, *contra*, argued for a new trial on two grounds: 1st, That the innkeeper refused to take charge of these goods, for which the plaintiff might have had his remedy in another form of action, but could not recover in this, which charged the defendant with having undertaken the care of them. But, 2ndly, the plaintiff did not come into the inn as a guest: he came there for the special purpose of desiring that the landlord would take charge of his goods until the next market day; and all the books agree that where goods are delivered to an innkeeper for a different purpose than to take charge of them as of the goods of a guest, no action will lie for any implied negligence. 1 Rol. Abr. 3, Action sur Case, E. 1. So in Dy. 158 b. If a guest come to an inn, and the inn-

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keeper refuse him because he is already full of guests, and the party says he will shift for himself among his guests, and his goods are there lost, the innkeeper is not chargeable. Now that [* 275] applies very * strongly to the circumstances of the present case ; where the plaintiff was informed by the innkeeper that they were already full of parcels, and could not take charge of his : after which, if he chose to remain there, it was at his own risk. He came to ask a favour as a neighbour and not as a guest ; and then, say the books, the innkeeper shall not be charged for a loss of goods. 8 Co. Rep. 32 ; 1 Com. Dig. 229. And in another passage in Com. Dig. 229 it is said that the action does not lie " if the goods are lost without any fault of the innkeeper." But here there is even evidence of negligence in the plaintiff himself, under whose personal care they still continued ; and any negligence in the guest will at all events discharge the innkeeper.

ASHHURST, J. — It does not appear to me that there is any ground for granting a new trial. If it had appeared, as the defendant's counsel have suggested, that these goods were lost through the mere negligence of the plaintiff's servant, the case might have deserved greater consideration ; but nothing of that kind appears on the Judge's report. According to the report, the case was simply this : the plaintiff's servant came to the inn, and desired to have the liberty of leaving the goods, which he could not dispose of in the market, until the next week ; that proposal was rejected ; then he sat down in the inn as a guest, with the goods behind him, and during that time the goods were taken away. But, although his request was not complied with, he was entitled to protection for his goods during the time he continued in the inn as a guest.

BULLER, J. — Although the defendant refused to take charge of the goods until the next week, the circumstances of this case distinguish it from that cited, where the innkeeper said his house was full, and refused to take in the guest : that, if true, is a good excuse ; and if false, the innkeeper is liable to an action for refusing to take in the guest. But here the request was merely to take care of the plaintiff's goods until the next week : if the defendant had taken the goods upon that request, he could only have been liable as a bailee ; but that proposal was not accepted, and then this case stands on general grounds. It is clear that the goods need not be in the special keeping of the innkeeper in order to

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make him liable : if they be in the inn, that is sufficient to charge him. In *Calve's Case* it is said, "Although the guest doth not deliver his goods to the innholder to keep, nor acquaints him with them, yet if they be carried away or *stolen, [*276] the innkeeper shall be charged ; and therewith agrees 42 Edw. III. 11 a." There it is said that on the words of the writ the innkeeper is answerable for everything in his inn, but not for a horse which the owner orders to be put out to pasture. One of the passages cited from Com. Dig. cannot be supported if taken in a general sense ; for all the authorities agree that it is not necessary to prove negligence in the innkeeper.

GROSE, J. — *Calve's Case*, which is a good comment on the writ which gives this action, decides this present case. According to that, if a man go into an inn and is accepted there as a guest, the innkeeper is bound to take care of the goods of the guest ; and so says the case in *Dyer*. If, indeed, the innkeeper had refused to take in the plaintiff's servant as a guest, and he had notwithstanding gone into the inn, the plaintiff could not have charged the defendant with the loss of his goods ; in such a case the innkeeper refuses at his peril, and if it be without reason, an action lies for the refusal : but in this case there was no refusal of the person ; the defendant merely refused to take care of the goods until the next week. And when the plaintiff's servant was sitting in the inn, with the consent of the innkeeper (for the latter did not object to receive him), he was in the same situation as any other guest, and entitled to the same protection for his goods.

Rule discharged.

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12 Q. B. D. 27–29 (s. c. 53 L. J. Q. B. 25 ; 49 L. T. 601 ; 32 W. R. 170).

Innkeeper. — Liability for Property of Guest. — Temporary Refreshment. [27]

The plaintiff arrived at Carlisle with the intention of spending the night at the defendants' hotel, which adjoined the railroad station. He delivered his luggage to one of the porters of the hotel, but after reading a telegram which was waiting for him, decided not to spend the night at Carlisle, and went into the coffee-room to order some refreshments. He was not able to obtain in the coffee-room exactly what he required, and went into the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. Shortly afterwards he went out, telling the porter to lock up his luggage, and it was locked up in a room near the refreshment-room. On his return he found that part of it was missing.

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Held, that at the time of the loss of the plaintiff's goods there was no evidence of the relation of landlord and guest between him and the defendants, so as to make them responsible.

Claim that defendants were innkeepers and kept a common inn for the accommodation of travellers ; that plaintiff, as a traveller, was received in the inn by them with his goods, consisting of a despatch-box and dressing-bag, &c. ; that defendants did not, whilst the plaintiff was staying at their inn, keep the despatch-box and dressing-bag with their contents safely, and they were then wrongfully taken and carried away from the inn by persons unknown to the plaintiff and lost to him, and that they were taken away owing to the neglect or default of the defendants or their servants.

Defence denying the material allegations. Joinder of issue.

At the trial before STEPHEN, J., at the Carlisle Summer Assizes, 1883, it appeared that the plaintiff arrived about noon at the railway station at Carlisle, and was there met by one of the porters of the defendants' hotel, to whom he gave three packages, including the despatch-box and dressing-bag mentioned in the statement of claim, and asked him to take them to the hotel, which adjoined the railway station. He then intended to pass the night at the hotel, but, after reading a telegram which he found waiting for him at the office, he decided to go on to Manchester the same day. He went into the coffee-room to dine, but was told that there was no [* 28] joint ready, and proceeded, by the * waiter's advice, to the station refreshment-room, which was under the same management as the hotel, and connected with it by a covered passage. On his way to the refreshment-room he met the porter with his luggage, and told him to lock it up till he was ready to start for Manchester. The luggage was locked up in a room adjoining the refreshment-room, but on the plaintiff's arrival at the platform part of it was found to be missing. Upon the objection that there was no evidence that the plaintiff ever became a guest of the defendants at their inn, the learned Judge ordered a nonsuit.

A rule having been obtained to set aside the nonsuit, or for a new trial,

E. Page (J. W. Lowther with him), showed cause, but was stopped.

Ambrose, Q. C., and Mattinson, in support of the rule. — The plaintiff must be taken to have been a guest at the defendants' inn at the time when his luggage was lost. The right of the plaintiff

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to charge the defendants for the loss of his goods is not affected by the length of his stay at the inn: *Calye's Case*, 1 Sm. L. C. 8th ed. p. 140, and *Bennett v. Mellor*, 5 T. R. 273 (p. 118, *ante*); it is not essential that he should have intended to spend the night there. He did not, by passing from the coffee-room into the refreshment-room, cease to be within the inn. The refreshment-room was connected with the house and was part of it. It might have been different if he had gone to the refreshment-room in the first instance as one of the public without any intention of visiting the rest of the house. The receipt of his luggage at the inn from the porter was a recognition of him as a guest. *Reg. v. Rymer*, 2 Q. B. D. 136, only shows that a refreshment-bar used by those who pass by is not an inn.

LORD COLERIDGE, C. J. — I think this rule must be discharged. The facts of the case, as I understand them, are these — [his Lordship stated the principal facts]. The law relating to the liability of innkeepers is fully considered in *Calye's Case*, and it is clear that in order to make the innkeeper liable at common law

* the plaintiff must have been a guest in the inn, according [* 29] to the words of the Latin writ which is set out in the beginning of *Calye's Case*, 1 Sm. L. C. 8th ed. p. 140. Now I can find no ground for saying that the plaintiff was in any sense a guest within the defendants' inn at the time when his luggage was lost. The case of *Bennett v. Mellor*, 5 T. R. 273 (p. 118, *ante*), has been relied on by the plaintiff as showing that it is not necessary to make the defendant liable that the guest should spend the night at the inn. But there it was expressly found that the plaintiff had come within the house and had placed his goods near his chair, so that the case is clearly distinguishable. On the other hand, the case of *Reg. v. Rymer*, 2 Q. B. D. 136, is, so far as it goes, against the plaintiff. If there had been any positive proof of negligence on the part of the defendants they might possibly have been liable; but in the absence of such proof, and the relation of landlord and guest not having been made out, the action cannot be maintained.

MATHEW, J. — I am of the same opinion. The counsel for the plaintiff were called upon to show at what point of time the relation of landlord and guest commenced. They suggested that it was when the plaintiff gave his luggage to the porter. But at that time the plaintiff had not made up his mind to become a guest. The fact that he ordered his goods to be locked up, and that they

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were locked up, is no more than if he had said that he was uncertain whether he should stay in the inn, and that in the meantime he wished his goods to be locked up. In such a case there could be no liability. I am clearly of opinion that there was no evidence which the learned Judge could have left to the jury.

Rule discharged.

ENGLISH NOTES.

An innkeeper is bound to admit a person who applies peaceably to be admitted as a guest. *Hawthorn v. Hammond* (1844), 1 C. & K. 404. An indictment lies against him if he refuses to do so: *Rex v. Ivens* (1835), 7 Car. & P. 213; and it is no defence for the innkeeper that the guest was travelling on Sunday, or at an hour of the night after the innkeeper's family had gone to bed, or that the guest refused to give his name and address. *Ib.* But if the guest comes to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him. *Ib.* It would seem, however, that a person cannot insist upon being admitted without tendering a reasonable sum for his entertainment as guest, unless such tender has been dispensed with. *Ib.*; *Fell v. Knight* (1841), 8 M. & W. 269, 5 Jur. 554.

It was held in an old case that if a man sent his horse to an inn, and it was received and kept there, that made him a guest, though he lodged in another place, and the innkeeper was bound to take him in. *York v. Grindstone* (1706) 1 Salk. 388, 2 Ld. Raym. 866.

As to the circumstances which constitute a person a guest, see further *Medawar v. Grand Hotel Co.* (C. A. 1891), 1891, 2 Q. B. 11, 60 L. J. Q. B. 209, 64 L. T. 851, cited in the notes to *Spice v. Bacon*, No. 3, p. 131, *post*.

Although a traveller is entitled to reasonable accommodation, he cannot insist upon occupying any particular apartment; nor can he use a bedroom for the purpose of sitting up all night, so long as the innkeeper is willing and offers to furnish him with a proper room for that purpose. *Fell v. Knight*, *supra*.

Where the guest brings luggage with him, it would appear that in the ordinary course the relationship of innkeeper and guest continues until the guest's property is brought and redelivered to him on his departure. *Medawar v. Grand Hotel Co.*, *supra*. Where a lady was received into an hotel as a traveller, and subsequently intimated her intention of staying for an indefinite time, it was held that the managers might give her reasonable notice to leave, and on expiry of the notice compel her to leave without giving any reason other than the notice. *Lamond v. Richards* (C. A. 1897), 1897, 1 Q. B. 541, 66 L. J. Q. B. 315.

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The innkeeper is bound to provide his guest with necessary food. See per Lord ELLENBOROUGH, Ch. J., in *Burgess v. Clements* (1815), 4 M. & S. 306, 16 R. R. 473, and also per DENMAN, J., in *Reg. v. Rymer* (1877), 2 Q. B. D. 136, 46 L. J. M. C. 108, 35 L. T. 774, 25 W. R. 415. But where a person resident within twelve hundred yards of a refreshment bar attached to an hotel, but having a separate entrance, after notice from the landlord that if he came there with his dogs (which had been complained of as a nuisance), he would not be served — came with a large dog and demanded refreshments; the landlord was held justified in refusing. *Reg. v. Rymer, supra.*

The enactment of 24 Geo. II., c. 40, s. 12, which prevents a person recovering for spirits supplied to a smaller amount than 20s. at a time, does not apply to spirits supplied by an hotel-keeper to a guest who is a resident at his inn. *Proctor v. Nicholson* (1835), 7 Car. & P. 67.

An innkeeper, though licensed to let post-horses, is not liable to an action for refusing to supply them to a guest. *Dicas v. Hides* (1816), 1 Starkie, 247. Nor is he bound to pay for the washing of the linen of his guests. *Callard v. White* (1816), 1 Starkie, 171.

It is the duty of an hotel-keeper to take reasonable care of the persons of his guests while they are in the hotel. *Sandys v. Florence* (1878), 47 L. J. C. P. 598. Thus a statement of claim which alleged that while the plaintiff was using an hotel of which the defendant was proprietor, as a guest for reward to the defendant, by the defendant's negligence the ceiling of the room in which the plaintiff then was fell upon and injured him, was held to show a good cause of action. *Ib.* This duty of the innkeeper does not, however, extend to every room in his house at all hours of night and day, but is limited to those places into which it is reasonable to suppose that guests will be likely to go in a reasonable belief that they are entitled or invited to do so. *Walker v. Midland Railway Co.* (1886), 55 L. T. 489.

The innkeeper is bound to receive such luggage and goods as the guest may bring with him, even though he knows that they are not the property of the guest. Per ESHER, M. R., in *Robins v. Gray* (1895), 1895, 2 Q. B. 501, 65 L. J. Q. B. 44, 73 L. T. 252, 44 W. R. 1, No. 5, p. 138, *post*. This, however, does not apply to things of a dangerous nature, such, for example, as a tiger or a quantity of dynamite. *Ib.*

“The duties, liabilities, and rights of an innkeeper with respect to goods brought to inns are founded not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers.” *Robins v. Gray, supra.*

The innkeeper is liable for a “loss not arising from the guest's negligence, the act of God, or the Queen's enemies.” Per POLLOCK,

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C. B., in *Morgan v. Ravey* (1861), 6 H. & N. 265, 30 L. J. Ex. 131, 3 L. T. 784, 9 W. R. 376; s. c. at Nisi Prius, 2 Fost. & Fin. 283. He is not responsible if there has been negligence on the part of the guest amounting to want of the care that a prudent man might reasonably have been expected to take in the circumstances. *Burgess v. Clements* (1815), 4 M. & S. 306, Holt N. P. 211 n., 1 Starkie, 251 n.; *Armistead v. Wilde* (1851), 17 Q. B. 261, 20 L. J. Q. B. 524, 15 Jur. 1010; *Cashill v. Wright* (1856), 6 El. & Bl. 891, 2 Jur. (N. S.) 1072; *Oppenheim v. White Lion Hotel* (1871), L. R. 6 C. P. 515, 40 L. J. C. P. 231, 25 L. T. 93; *Jones v. Jackson* (1873), 29 L. T. 399; see also *Medawar v. Grand Hotel Co.* (1891), cited in notes to No. 3, p. 131, *post*.

It has more than once been held that the omission of the guest to lock the door of his room on retiring to rest did not amount to such negligence on his part as to relieve the landlord of liability for loss of the guest's goods. *Morgan v. Ravey* (1861), *supra*; *Filipowski v. Merryweather* (1861), 2 Fost. & Fin. 285; *Mitchell v. Woods* (1867), 16 L. T. 676; *Herbert v. Markwell* (1882), 45 L. T. 649, affirmed in Court of Appeal, W. N. (1882), p. 112. This, however, cannot be accepted as an established proposition of law, and each case must be determined upon its own circumstances. *Herbert v. Markwell*, *supra*; *Oppenheim v. White Lion Co.*, *supra*.

The omission of the guest to leave valuable articles with the innkeeper is not necessarily such negligence as disentitles him from recovering. *Morgan v. Ravey* (1861), *supra*.

An innkeeper has been held liable for a parcel left in the lobby or hall of the inn: *Candy v. Spencer* (1863), 3 Fost. & Fin. 306; and where the guest directs valuable goods to be placed in the public room, and the innkeeper does not require them to be removed to a safer place, he is liable as an insurer in the event of their being stolen: *Richmond v. Smith* (1828), 8 B. & C. 9, 2 Man. & Ry. 235.

But if the goods are deposited in a room which the guest uses as a warehouse, or for the purpose of exhibiting them to his customers, and of which he has the exclusive possession, the innkeeper will not be answerable for their loss. *Farnworth v. Packwood* (1816), 1 Starkie, 249, Holt N. P. 209; *Burgess v. Clements* (1815), 4 M. & S. 306, Holt N. P. 211 n., 1 Starkie, 251 n.

As appears from the principal case of *Bennett v. Mellor*, No. 1, *supra*, the innkeeper will none the less be liable though he may have refused to take charge of the goods until a future day, owing to his house being full of parcels.

A notice in the guest's bedroom, stating that the proprietor requests visitors to use the night-bolt, and to leave articles of value at the

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bar, otherwise he will not be responsible, will not relieve him of his liability at common law. *Morgan v. Ravey* (1861), 6 H. & N. 265, 30 L. J. Ex. 131, 3 L. T. 784, 9 W. R. 376; s. c. at Nisi Prius, 2 Fost. & Fin. 283.

If a person who is not a guest leaves goods at an inn by consent of the landlord, or if a guest on leaving an inn deposits goods with the innkeeper for safe custody, the innkeeper is only bound to take such care as a reasonable man would take of his own goods, and his negligence will not be presumed from the mere fact of their being injured or stolen. *Angus v. McLachlan* (1883), 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. 863.

An innkeeper is responsible for money belonging to his guest. *Kent v. Shuckard* (1831), 2 B. & Ad. 803. Lord TENTERDEN observes that there is no distinction in this respect between an innkeeper and a carrier. "The principle on which the liability of an innkeeper for the loss of the goods of his guest is founded, is, both by the civil and common law, to compel the innkeeper to take care that no improper person be admitted into his house, and to prevent collusion between him and such person." And he cites the familiar comment in the Digest (IV. 9, 1) upon the Edict Nautæ Canpones, &c.

A traveller coming on a fair day with a horse and gig to an inn ordered the horse to be put into the stable, but gave no special direction as to the gig. The horse was put into the stable, and the gig was placed with other carriages in the public highway near the house, where it was the practice of the innkeeper to put carriages on fair days. The gig having been stolen, it was held that the innkeeper was answerable for the loss. *Jones v. Tyler* (1834), 1 Ad. & El. 522, 3 N. & M. 576.

Where the horse of a guest at an inn was stabled with another horse, by which it was kicked and injured, it was held that the presumption was that the injury had been caused through the negligence of the innkeeper, but that it was open to him to rebut the presumption by showing that he had used due care. *Dawson v. Chamney or Cholmley* (1843), 5 Q. B. 164, D. & M. 348, 13 L. J. Q. B. 33. By an arrangement between an innkeeper and her ostler, he had the profit of the stables, paying no rent, but providing hay, corn, &c., and supplying not only the guests, but residents in the town whose horses he was allowed to take care of. A person who had no knowledge of this arrangement arrived at the inn with his horse and gig, which were taken to the stable, and became a guest. He subsequently left, saying that he should not be back till the following Monday, and requested that the horse should be attended to. He did not return for a fortnight, and in the meantime the ostler, for the alleged purpose of exer-

cising the horse, drove it out, when it took fright at a locomotive engine and was damaged. It was held that the relation of innkeeper and guest subsisted between the parties, and consequently the former was liable. *Day v. Bather* (1863), 2 H. & C. 14, 32 L. J. Ex. 171, 8 L. T. 205, 11 W. R. 575.

An innkeeper was held liable for allowing a horse kept at his stable to be ridden immoderately and whipped. *Stannian v. Davis* (1706), 1 Salk. 404, 6 Mod. 223.

As to the manner in which an innkeeper may limit his liability for his guest's goods under the Innkeeper's Liability Act, 1863, see *Spice v. Bacon* (1877), No. 3, p. 131, *post*, and the notes thereto.

An hotel-keeper is subject to the same liabilities as an innkeeper. *Jones v. Osborne* (1785), 2 Chitty, 484. A person keeping a house of public entertainment in London, where provisions and beds were furnished to all persons applying and paying for them, but which was merely called a tavern and coffee-house, and was not frequented by stage-coaches or waggons, and had no stables attached to it, was held to be an innkeeper, and subject to the privileges and liabilities appertaining to that character. *Thompson v. Lacy* (1820), 3 B. & Ald. 283, 22 R. R. 385. But the innkeeper's liability for the goods of a guest is not incurred by a boarding-house keeper: *Dansey v. Richardson* (1854), 3 El. & Bl. 144, 23 L. J. Q. B. 217; a lodging-house keeper: *Holden v. Soulby* (1860), 8 C. B. (N. S.) 254, 29 L. J. C. P. 246; nor by a salaried manager of an hotel company, even though the license has been granted to him personally: *Dixon v. Birch* (1873), L. R. 8 Ex. 135, 42 L. J. Ex. 135, 28 L. T. 360, 21 W. R. 443. It may be remarked that a coffee-house keeper has been held not to be an innkeeper, within the meaning of a policy of insurance against fire. *Doe v. Laming* (1814), 4 Camp. 77.

The liability of an innkeeper is strongly contrasted with that of a gratuitous bailee. See *Giblin v. M Mullen* (1868), L. R. 2 P. C. 318, 38 L. J. P. C. 25, 21 L. T. 214, 17 W. R. 445, fully reported as No. 3 of "Banker," 3 R. C. 613, and the notes thereto. See also "Deposit," 9 R. C. 283.

Where the plaintiff went into the defendant's restaurant for the purpose of dining, and his overcoat was taken by the waiter at the table, and without any directions hung on a peg in the room, and was afterwards stolen, it was held that the jury were justified in finding that (although the defendant was not liable as an innkeeper) there was a bailment and such negligence as made the defendant liable. *Ultzen v. Nicols* (1893), 1894, 1 Q. B. 92, 63 L. J. Q. B. 289, 70 L. T. 140, 42 W. R. 58.

An innkeeper is, by reason of section 2 of the Dogs Act, 1865,

Nos. 1, 2. — *Bennett v. Mellor*; *Strauss v. County Hotel and Wine Co.* — Notes.

deemed to be the owner of a dog living at his inn, and is liable for injuries to cattle caused by it, notwithstanding that the dog was at the time of the injuries complained of under the control of a person staying at the hotel, to whose care it had been committed by the real owner. *Gardner v. Hart* (1896, April 27), 44 W. R. 527.

AMERICAN NOTES.

The liability attaches when the goods come expressly or impliedly under the charge of the innkeeper, but only when their owner is a guest. So a boarding-house keeper is not responsible for the boarder's goods. *Taylor v. Downey*, 104 Michigan, 532; 29 Lawyers' Rep. Annotated, 92 (the case of an innkeeper in whose safe a regular boarder deposited money for safety); *Jennings v. Reynolds*, 4 Kansas, 110. So where a man arrived at Toronto from Ireland, and drove from the railway station to the defendant's hotel, and took his portmanteau to a room, saying he only wanted it to change his dress and go to friends, and after occupying it for an hour went to his friends, with whom he remained: held, that he was not a guest. *Lynar v. Mossop*, 36 U. C. Q. B. 230. So putting his horse in the inn stable, but with no intention of staying at the inn, does not make one a guest. *Healey v. Gray*, 68 Maine, 489; 28 Am. Rep. 80. See *Towson v. Harre de Grace Bank*, 6 Harris & Johnson (Maryland), 47; 14 Am. Dec. 254. The earlier cases held that one might become a guest merely by bringing his property into the inn, without lodging or eating there. *Mason v. Thompson*, 9 Pickering (Mass.), 280; 20 Am. Dec. 471; *McDaniels v. Robinson*, 26 Vermont, 316; 62 Am. Dec. 574; *Thickstun v. Howard*, 8 Blackford (Indiana), 535; *Peet v. McGraw*, 25 Wendell, 653, founding on *York v. Grindstone*. But this is now discarded. *Grinnell v. Cook*, 3 Hill (New York), 485; 38 Am. Dec. 663; *Ingallsbee v. Wood*, 33 New York, 577; 88 Am. Dec. 409.

It is sufficient if the goods are within the inn. *Epps v. Hinds*, 27 Mississippi, 657; 61 Am. Dec. 528 (money stolen from guest's room); *Clute v. Wiggins*, 14 Johnson (New York), 175 (sleigh loaded with grain in an appurtenant outhouse, citing *Bennett v. Mellor*). But not where a wagon is placed in a shed in an open yard, even by the landlord's consent. *Albin v. Presby*, 8 New Hampshire, 408; 29 Am. Dec. 679. And the landlord is not responsible for the guest's clothes taken off while bathing at a sea-bathing house kept by the same landlord separate from the inn. *Minor v. Staples*, 71 Maine, 316; 36 Am. Rep. 318.

The liability may attach even before the goods come to the inn, as where they are taken by the house-porter at a railway station. *Coskery v. Nagle*, 83 Georgia, 696; 20 Am. St. Rep. 333; 6 Lawyers' Rep. Annotated, 483; *Dickinson v. Winchester*, 4 Cushing (Mass.), 114; 50 Am. Dec. 760.

The landlord is not responsible if the guest keeps exclusive control and possession. *Weisenger v. Taylor*, 1 Bush (Kentucky), 275; 89 Am. Dec. 626; *Fuller v. Coats*, 18 Ohio State, 313; *Newson v. Axon*, 1 McCord (So. Car.), 509; 10 Am. Dec. 685.

Nor if the guest exposes them in the house for sale. *Myers v. Coltrill*,

Nos. 1, 2. — Bennett v. Mellor; Strauss v. County Hotel and Wine Co. — Notes.

5 Bissell (U. S. Circ. Ct.), 465; *Neal v. Wilcox*, 4 Jones Law (So. Car.), 146; 67 Am. Dec. 266. See *Mowers v. Fethers*, 61 New York, 34; 19 Am. Rep. 244; *Lynar v. Mossop*, 36 U. C. Q. B. 231; *Healey v. Gray*, 68 Maine, 489; 28 Am. Rep. 80; *Hickman v. Thomas*, 16 Alabama, 666; *Touson v. Hacre de Grace Bank*, 6 Harris & Johnson (Maryland), 47; 14 Am. Dec. 254; *Toub v. Schmidt*, 60 Hun (New York Sup. Ct.), 409.

The general rule is that for whatever the guest brings into the inn by the landlord's consent, without limit as to kind or amount, he is responsible. *Hilton v. Adams*, 71 Maine, 19 (cattle); *Sassen v. Clark*, 37 Georgia, 242; *Kellogg v. Sweeney*, 1 Lansing (N. Y. Sup. Ct.), 397; *Quinton v. Courtney*, 1 Haywood (North Car.), 40 (money in saddle-bags); *Walsh v. Porterfield*, 87 Penn. St. 376 (diamond pin). The amount of money for which he is responsible is not limited to what is necessary for travelling expenses. *Smith v. Wilson*, 36 Minnesota, 334; 1 Am. St. Rep. 669.

But in some States this has been relaxed by the Courts, and the innkeeper has been held only for ordinary baggage, suitable to the station of the guest and the necessities of the journey: *Pettigrew v. Barnum*, 11 Maryland, 434; 69 Am. Dec. 212 (not liable for silver knives, forks, and spoons); *Giles v. Fauntleroy*, 13 *ibid.* 136 (not liable for a pistol and spoons); but a reasonable amount of money is covered: *Noble v. Milliken*, 74 Maine, 225; 43 Am. Rep. 581 (forty dollars); *Van Wyck v. Howard*, 12 Howard Practice (New York), 152 (four hundred and fifty dollars for a traveller from Europe); *Murchison v. Sergeant*, 69 Georgia, 206 (five hundred dollars and a gold watch). So of a watch-chain and jewels. *Maltby v. Chapman*, 25 Maryland, 310.

The liability extends to what the guest buys outside after arrival, and brings into the inn. *Needles v. Howard*, 1 E. D. Smith (1 N. Y. Com. Pl.), 54 (laces).

It has been held that purchasing liquor at an inn constitutes one a guest. *McDonald v. Edgerton*, 5 Barbour (New York Sup. Ct.), 560, citing *Bennett v. Mellor* (cited in American notes to Smith's Lead. Cas., vol. i. p. 414). So of beer and cigars. *Fairchild v. Bentley*, 30 *ibid.* 153. Of *Bennett v. Mellor* Chief Justice DALY said, in *Kopper v. Willis*, 9 Daly (N. Y. Com. Pl.), 465: "I have heretofore expressed a doubt whether the case was rightly determined, but it has been acquiesced in and acted upon for nearly a century." (The case of *Kopper v. Willis* was of a restaurant licensed as an inn, where the plaintiff hung his overcoat on a hook provided therefor, and dined, and he was held a guest.) Mr. Freeman says of *Bennett v. Mellor*, in a note, 62 Am. Dec. 587: "This case is generally regarded as carrying the doctrine of the liability of the innkeeper to an extreme limit." He cites *McDonald v. Edgerton*, however, without dissent.

The liability of the innkeeper ceases when the depositor ceases to be a guest, as where he pays his bill and departs, leaving his luggage. *Glenn v. Jackson*, 93 Alabama, 342; 12 Lawyers' Rep. Annotated, 382; *Miller v. Peebles*, 60 Mississippi, 819; 45 Am. Rep. 423; *Whitemore v. Haroldson*, 2 Lea (Tennessee), 312; *Lawrence v. Howard*, 1 Utah, 142 (guest required to leave on account of non-payment); *Murray v. Marshall*, 9 Colorado, 482; 59 Am. Rep. 152; *O'Brien v. Vaill*, 22 Florida, 627; 1 Am. St. Rep. 219; *McDaniels v. Robinson*, 26 Vermont, 316; 62 Am. Dec. 574.

No. 3. — *Spice v. Bacon*, 46 L. J. Ex. 713. — Rule.No. 3. — *SPICE v. BACON*.

(C. A. 1877.)

RULE.

A MERE verbal error in a copy of section 1 of the Innkeepers Liability Act, 1863 (26 & 27 Vict., c. 41), exhibited for the purpose of limiting an innkeeper's liability, will not vitiate the notice, so as to make it ineffectual, provided the notice states correctly the provisions of the Act; but the omission of a material portion of the statute will render the notice ineffectual to protect the innkeeper.

Spice v. Bacon.

46 L. J. Ex. 713-715 (s. c. 2 Ex. D. 463; 36 L. T. 896; 25 W. R. 840.)

Innkeeper's Liability Act, 1863. — *Sufficiency of Notice limiting Liability*. [713]

In the defendant's hotel a notice was exhibited containing a copy of the first section of the Act, correct in every particular except that in the exception the word "act" in the clause "through the wilful act, default, or neglect" was accidentally omitted. *Held*, that this was a material omission, and that the notice was insufficient to protect the innkeeper.

This was an appeal from a decision of the LORD CHIEF BARON.

The action was brought to recover from the defendant, an innkeeper, the value of property stolen from the plaintiff's bedroom at the defendant's inn. The defendant pleaded that a copy of section 1 of 26 & 27 Vict., c. 41, was exhibited in a conspicuous part of his house at the time of the alleged loss; and paid into Court the sum of £30.

By 26 & 27 Vict., c. 41, s. 1, "no innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of £30, except in the following cases (that is to say):—

"(1.) Where such goods or property have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ:

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[* 714] “(2.) Where such goods or property shall * have been deposited expressly for safe custody with such innkeeper:

“Provided always, that in the case of such deposit, it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.”

And by section 3, “Every innkeeper shall cause at least one copy of the first section of this Act to be exhibited in a conspicuous part of the hall or entrance to his inn; and he shall be entitled to the benefit of this Act in respect of such goods and property only as shall be brought to his inn while such copy shall be so exhibited.”

The copy of the first section posted by the defendant in the hall of his inn was correct in every respect except that in the first exception the word “act” was omitted, so that the sentence ran thus:—

“1. Where such goods or property have been stolen, lost, or injured through the wilful default or neglect of such innkeeper, or any servant in his employ.”

At the trial before the LORD CHIEF BARON, it was contended on behalf of the plaintiff that the notice so posted was not a copy of the first section of the Act within the meaning of section 3.

A verdict was taken for the plaintiff, and judgment reserved.

On the 24th of April the plaintiff moved for judgment before the LORD CHIEF BARON, who gave judgment for the plaintiff, upon the ground, *inter alia*, that the omission of the word “act” in the notice posted by the defendant made a substantial alteration in the meaning of the section of which it purported to be a copy; that, therefore, it was not a copy of that section within the meaning of section 3, and, consequently, the innkeeper was not protected by the notice.

Against this decision the defendant appealed.

Grantham and Johnstone, for the defendant. — This is substantially a copy of the first section of the Act. A mere clerical error makes no difference, and the omission of the word “act” has no bearing on the present case. BYLES, J., at *Nisi Prius*, in the case of *Squire v. Wheeler*, 16 L. T. (N. S.) 93, says that the word “wilful” in this section qualifies the word “act” only. In the notice the word “wilful” is applied, accidentally, to default. But “wil-

No. 3. — *Spice v. Bacon*, 46 L. J. Ex. 714, 715.

ful default" must include act as well as omission, so that there is no substantial alteration.

Herschell and Gainsford Bruce, for the plaintiff. — The copy of the first section posted by an innkeeper in order that he may claim exemption must be a correct copy, for conditions imposed for the benefit of a particular class of persons by Act of Parliament must be strictly construed. *Vaux v. Vollans*, 4 B. & Ad. 525. "Wilful default" is not the same as "wilful act;" it means wilful non-feasance; so that in this notice the case of loss happening by the wilful act of the innkeeper or his servants is altogether omitted. This is a material omission, and vitiates the notice.

Johnstone replied.

CAIRNS, L. C. — As to the effect of this notice under the statute, we regret that we are forced to come to the same conclusion as the learned Judge who tried the case; for no doubt it was the intention of the defendant to exhibit an accurate copy of the section, and the omission occurred merely *per incuriam*. But it has occurred, and we must deal with it. At first it appeared that the omission was a trivial one, immaterial to the sense of the enactment, and I should not have been prepared in that case to hold that if a notice had been put up, and all that could be said against it was that a word or two was incorrect or had been omitted, such notice was not a copy of the section within the meaning of the Act. But it would seem that the printer omitted the word "act," and the sentence, which should have run: "Stolen, lost, or injured through the wilful act, default, or neglect" of such innkeeper, or any servant in his employ, runs: "Stolen, lost, or injured through the wilful default or neglect" of such innkeeper, or any servant in his employ. There is, therefore, no statement in the notice, or rather no admission of the continuance of the innkeeper's common-law liability, if the loss occurs through the wilful act of the innkeeper or his servants. The result would be that, supposing in a particular instance the lost property had been stolen by a servant of the innkeeper, the notice would in * effect [* 715] be an assertion that the innkeeper's common-law liability had ceased in that case, — a notice not admitting the common-law liability when the loss is by the act of the innkeeper's servant. If so, the omission entirely alters the operation of the Act, and is not a notice stating the law as the statute lays it down, and therefore not sufficient to give the innkeeper the protection of the statute.

I therefore feel obliged to hold that the statute has not been complied with, and the case must be considered as if the statute had not passed.

COCKBURN, L. C. J. — I entirely concur in the view taken by the LORD CHANCELLOR. I concur in saying that if this had been a mere clerical error the notice might suffice, and would still be a copy of the section within the meaning of the Act; but when we find an omission of something material to the correct statement of the rights and liabilities of the parties respectively, we have something more than a clerical error, — an omission of a material and substantive part of the statute. Therefore I cannot think that this notice contains a copy of the first section of the Act sufficient to satisfy the requirements of the statute.

BRAMWELL, L. J. — I am of the same opinion.

Judgment for the plaintiff.

ENGLISH NOTES.

Where a person while a guest at an hotel had certain jewellery stolen, it was held that the fact that the hotel-keeper's servants did not cause the premises to be searched on finding a poker and a knife on the bed in the guest's room from which the jewellery was stolen, was no evidence of negligence on the part of such servants. *Marchioness of Huntly v. Bedford Hotel Co.* (1891), 56 Justice of the Peace, 53.

The plaintiff went early in the morning to the defendant's hotel. The hotel was full, but he was allowed to use, for the purpose of dressing, a bedroom which had been engaged by other persons, and his luggage was taken to that room. He dressed and went down to breakfast, leaving the room unlocked and the stand of his dressing-bag outside the bag and exposed upon the dressing-table. After paying for his breakfast he went out, and did not return till late at night. Meanwhile the persons who had engaged the room arrived, and one of the hotel servants removed the plaintiff's luggage into the corridor as it was, leaving the dressing-stand out of the bag. On the plaintiff's return another room was found for him, and his luggage was brought to it. The plaintiff then found that jewellery had been stolen from a drawer in the stand, and sued the hotel company for damages for the loss. There was no evidence to show whether the jewellery was stolen while the stand was in the bedroom, or after it had been placed in the corridor. It was held by the majority of the Court of Appeal that the plaintiff was received as a guest into the hotel, and continued a guest until a reasonable time after his goods had been placed in the corridor.

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and that if the jewellery was stolen while the stand was in the bedroom, there was contributory negligence on his part; but if they were stolen while the stand was in the corridor, the loss was due solely to the negligence of the defendants; that, as it had not been proved whether the theft was committed in the bedroom or in the corridor, the defendants were liable up to £30 under the Act, because they could not show contributory negligence; but that they were not liable beyond that amount, because the plaintiff could not show that the loss had occurred "through the wilful act, default, or neglect" of the defendants. *Medawar v. Grand Hotel Co.* (1891), 1891, 2 Q. B. 11; 60 L. J. Q. B. 209, 64 L. T. 851.

A guest who wishes to leave his goods in the landlord's custody should himself deliver them to the landlord, or to some one who has authority to receive them. If he hands a bag containing valuables to the boots, who has no authority to receive the custody of such articles, he will be unable to recover more than the £30. *Moss v. Russell* (1884), 1 Times Rep. 13.

In the room occupied by the plaintiff while a guest at the defendant's hotel there was a notice that "articles of value, if not kept under lock, should be deposited with the manager, who will give a responsible receipt for the same." The jewellery was kept in a locked jewel-box inside a basket trunk that was also locked in the plaintiff's room. It was held that this notice did not constitute a special bargain with the plaintiff that the defendant would be responsible if jewels were kept under lock. *Marchioness of Huntly v. Bedford Hotel Co.* (1891), 56 Justice of the Peace, 53.

AMERICAN NOTES.

This case is cited by the present writer in *Bailments*, pp. 88, 89, with the remark: "It is difficult to understand the force of this reasoning. The landlord would be liable at common law in spite of his omission, and the omission could have no effect on the guest unless to make him more careful."

SECTION II. — *Lien*.

No. 4. — THREFALL v. BORWICK.

(EX. CH. 1875.)

No. 5. — ROBINS & CO. v. GRAY.

(C. A. 1895.)

RULE.

THE lien of an innkeeper extends over goods brought to the inn by a guest as his luggage, although known by the innkeeper to belong to third persons.

Threfall v. Borwick.

L. R. 10 Q. B. 210-212 (s. c. 44 L. J. Q. B. 87; 32 L. T. 32; 23 W. R. 312).

[210]

Innkeeper, Lien of. — Piano.

A. went to the defendant's inn and stayed there with his family for some time; he took with him to the inn a piano as his own which he had hired of the plaintiff. A. having left the inn in debt to the defendant, the defendant claimed as against the plaintiff to detain the piano by virtue of his lien as innkeeper.

Held, affirming the decision of the Court of Queen's Bench, that, whether the defendant as innkeeper was bound to take in the piano or not, having done so he had a lien upon it.

Appeal from the decision of the Court of Queen's Bench, discharging a rule to enter the verdict for the plaintiff.

The declaration was for detaining a pianoforte of the plaintiff.

Plea, *inter alia*, the defendant's lien as an innkeeper.

It appeared at the trial before LUSH, J., at the Lancaster Spring Assizes, 1872, that the defendant kept an hotel on Lake Windermere, and one Butcher came there, with his wife and sister, in April, 1871. In addition to board and lodging, Butcher had a private sitting-room. He brought with him a pianoforte, which the defendant thought was Butcher's own, but which he had hired of the plaintiff. This was put in the sitting-room. After several weeks Butcher left the hotel £45 in the defendant's debt for board, &c.; and on demand by the plaintiff, the defendant claimed

No. 4. — *Threfall v. Borwick*, L. R. 10 Q. B. 210, 211.

to detain the piano, in exercise of his lien as innkeeper, for the debt due from Butcher.

A verdict passed for the defendant, with leave to move to enter it for the plaintiff for twenty-two guineas, and a rule was obtained accordingly, on the ground that the plaintiff had no lien upon the piano. The Court of Queen's Bench discharged the rule. (L. R. 7 Q. B. 711, 41 L. J. Q. B. 266.)

J. Edwards, Q. C., for the plaintiff. — It must be admitted that an innkeeper has a lien on goods brought by the guest as his own, although they do not really belong to him. But the lien is only upon such goods as he would be bound to take in. In *Broadwood v. Granara*, 10 Ex. 417, 420, 423, 24 L. J. [*211] Ex. 1, in which the defendant claimed a lien upon a piano which had been sent by the plaintiffs to the defendant's inn for the use of a guest, PARKE, B., in the course of the argument, says: "An innkeeper has a lien on such goods only as he is compelled to receive with his guest. Could he be indicted for not receiving a pianoforte? It might be a nuisance to persons in his house." And again, in his judgment, the same learned Judge says: "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends upon his public profession. If he has only a stable for a horse, he is not bound to receive a carriage. There was no ground whatever for saying that the defendant was under an obligation to receive this pianoforte."

[Lord COLERIDGE, C. J. — The 5th resolution in *Culpe's Case*, 8 Co. Rep. at fol. 33 a, extends the innkeeper's liability for loss beyond that. Is there any authority, except the *dicta* of PARKE, B., which were unnecessary for the decision of the case in hand, that the lien is only commensurate with the obligation to receive?]

No other authority can be found. In *York v. Greenough*, 2 Id. Raym. 866, the right seems to have been based on the obligation to receive.

[BRAMWELL, B. — If the piano had been stolen, would the defendant have been liable?]

 No. 5. — *Robins & Co. v. Gray*, 1895, 2 Q. B. 501, 502.

It must be conceded that he would.

[BRAMWELL, B. — Is not that conclusive in favour of the lien?]

W. G. Harrison, for the defendant, was not called upon.

LORD COLERIDGE, Ch. J. — The plaintiff's counsel has said all that could be urged in support of his case, which is really hopeless. It is admitted that in general an innkeeper has a lien on all goods which the guest brings with him as his own, whether they are his own or another's; and the only question raised is, whether

the lien extends to goods which the innkeeper would [* 212] not have *been bound to receive. I may say that I

should be inclined to agree, if a guest brought a piano with him for his own amusement, that, according to the advanced usages of society, the innkeeper might be well held to be bound to receive it, if he has room for it. But it is quite unnecessary to decide that question, because we are all clearly of opinion that, the defendant having taken in the piano and safely kept it, it is too clear to be doubted that he has a lien upon it. Both on principle and authority the judgment must be affirmed.

BRAMWELL, CLEASBY, POLLOCK, and AMPHLETT, BB., concurred.

Judgment affirmed.

Robins & Co. v. Gray.

1895, 2 Q. B. 501-510 (s. c. 65 L. J. Q. B. 44; 73 L. T. 252; 44 W. R. 1).

[501] *Innkeeper. — Lien. — Commercial Traveller.*

A commercial traveller employed by a firm who dealt in sewing-machines went to stay at an inn, and whilst there machines were sent to him by his employers in the ordinary course of business, for the purpose of selling them to customers in the neighbourhood. Before the goods were so sent the innkeeper had express notice that they were the property of the employers, but he received them as the baggage of the traveller, who subsequently left the inn without paying his bill for board and lodging.

Held (affirming the judgment of WILLS, J.), that the innkeeper had a lien upon the goods for the amount of his bill.

Appeal from the judgment of WILLS, J., in an action tried without a jury. (1895, 2 Q. B. 78.)

The action was brought to recover from the defendant, [* 502] an *innkeeper, certain sewing-machines, the property of the plaintiffs, which they alleged were wrongfully detained by the defendant.

No. 5. — *Robins & Co. v. Gray*, 1895, 2 Q. B. 502, 503.

The plaintiffs were a firm of dealers in sewing-machines and other articles. In 1894 they had in their employment as a commercial traveller one Green, who canvassed for orders and sold their goods upon commission. In April, 1894, Green, for the purposes of his business as such commercial traveller, went to stay at the defendant's hotel, taking with him sewing-machines, the property of his employers, for the purpose of selling them to customers in the neighbourhood. He remained there until the end of July. Whilst there the plaintiffs sent to him from time to time more sewing-machines for the same purpose. At the end of July Green left the hotel without paying his bill for board and lodging, and he left there some of the machines so sent. Before the defendant received into his hotel the machines so sent, and before Green had incurred his debt for board and lodging, the defendant had been expressly told by the plaintiffs that the machines were their property, and not the property of Green; but he received the goods into his hotel as Green's baggage. The defendant claimed a lien for the amount of Green's debt upon the machines left by him at the hotel.

On the above facts the learned Judge gave judgment for the defendant.

The plaintiffs appealed.

Arthur Powell and Guy Granet, for the appellants. — An innkeeper's lien attaches only in respect of goods which he receives into his inn in his character of an innkeeper, and as the goods of the guest who brings them, or, perhaps, to whom they are sent. *Smith v. Dearlove*, 6 C. B. 132. Where the innkeeper has notice that the goods so brought or sent are not the property of the guest but of some other person, and therefore does not receive them as the goods of the guest, he has no lien. His right of lien depends upon whether he is bound to receive the goods into his inn and to keep them safely as his guest's goods, and he is not bound to do either of those things if, to his knowledge, the * goods are not the goods of the guest. The sewing- [503] machines in question here were not the guest's personal luggage, but merchandise sent by the plaintiffs for a temporary purpose; namely, to be kept by the guest until they could be sold in the neighbourhood. They were, therefore, like the piano hired by a guest staying at an inn in *Broadwood v. Granara*, 10 Ex. 417, in which case it was held that the innkeeper, who

knew the circumstances under which the piano was brought into the inn, had not a lien. In all the cases the question of the innkeeper's knowledge with respect to the property in the goods has been treated as material. In *Johnson v. Hill*, 3 Stark. 172, ABBOTT, C. J., and in *Turrill v. Crawley*, 13 Q. B. 197, COLERIDGE, J., left that question to the jury. In *Threfall v. Borwick*, L. R. 10 Q. B. 210 (p. 136, *ante*), the innkeeper believed that the piano which the guest had hired from the plaintiff was the guest's own property; and in *Mulliner v. Florence*, 3 Q. B. D. 484, the goods were received by the innkeeper as part of the guest's own property. In *Gordon v. Silber*, 25 Q. B. D. 491, LOPES, L. J., in his judgment treated as material the fact that the innkeeper knew of no distinction between the goods of the husband and those which were the separate property of the wife, both having brought goods to the inn. *Robinson v. Walter*, 3 Bulstr. 269, is not in point, because the decision only was that an innkeeper had a lien upon the horse of a stranger for the keep of the horse — not for the debt of the person who brought it to the inn.

W. E. Hume Williams, for the respondent, was not called upon to argue.

LORD ESHER, M. R. — I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon [* 504] *that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveller comes to an inn with goods which are his luggage, — I do not say his personal luggage, but his luggage, — the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveller but not his luggage. If the traveller brought something exceptional which is not luggage, — such as a tiger or a package of dynamite, — the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his

goods. He has not to inquire whether the goods are the property of the person who brings them or of some other person. If he does so inquire, the traveller may refuse to tell him; and may say, "What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in;" or he may say, "They are not my property, but I bring them here as my luggage, and I insist upon your taking them in;" and then the innkeeper is bound by law to take them in. Again, suppose the things brought are such things as the innkeeper is not bound to take in, he may, as I have said, refuse to take them in although the traveller demands that they shall be taken in as his luggage; but if after that the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm. Then the innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely, unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them, as well as for the cost of the food and entertainment of the traveller. By law that lien can be enforced, not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has been the *law for two or three hundred years; but to-day [* 505] some expressions used by Judges, and some questions — immaterial, as it seems to me — which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in; or, if he does take them in, he has no lien upon them. One cannot help asking, What is his liability supposed to be if he does take in goods under such circumstances? It must be borne in mind that goods brought into an inn are not exclusively in the possession of the innkeeper; the person who brings them may deal with them: he may take them out of a box in a room or passage without the knowledge of the innkeeper, though the latter is bound to see that no one else interferes with them. Now, is there any decided case in which it has been held

that, although goods have been brought to an inn as the luggage of the traveller and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveller? There is not one such case to be found in the books. It was said that *Broadwood v. Granara*, 10 Ex. 417, was such a case. But there the proposition, that if a guest brings goods into an inn as his luggage they must be treated as if they were his goods, was fully recognised. The Judges held in that case that a piano, not brought to the inn by the guest as his luggage, but sent in by a tradesman for the guest to play upon during his stay at the inn, was not offered to, nor taken possession of by, the innkeeper under the custom of the realm as the luggage of the guest, and therefore that the piano was not subject to the innkeeper's lien. Whether we should have agreed with that decision is immaterial. The case was expressly decided on the ground that the law of innkeepers did not apply. It is, therefore, no authority in the case now before us, where, as the learned Judge in the Court below has found, the goods were brought to the inn as the goods of the traveller and accepted as his goods by the innkeeper. If we were to accede to the argument for the appellants we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a [* 506] person who *comes to the inn is travelling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches, and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial. This appeal should, therefore, be dismissed.

KAY, L. J. — In this case the appellants bring their action for the detention of certain sewing-machines of which they are the owners. The defence is, "I am an innkeeper; the goods in question came into my possession as the goods of a guest at my inn, and I have a lien upon them for the unpaid bill of that guest." Replication, "You knew that they were not his goods; you had notice that they did not belong to him, but that they belonged to us, the plaintiffs." The question is, whether that is a good replication. The facts are: The appellants' traveller went to the inn, taking some sewing-machines with him, and stayed there. Whilst there other machines were sent to him by his employers, and those machines were received by the innkeeper, and were taken care of

No. 5. — *Robins & Co. v. Gray*, 1895, 2 Q. B. 506, 507.

by him, and were in his possession. The traveller left without paying his bill for board and lodging at the inn. I agree with WILLS, J., that the fact that some of the machines were sent to the inn after the traveller had gone there does not make any difference; because the innkeeper accepted them as he had accepted the machines originally brought to the inn by the traveller — that is, as the goods of the traveller — I do not mean his property, because the innkeeper knew that they were the property, not of the traveller, but of his employers. Now, we have had an elaborate argument, and various cases have been cited in support of the appellants' case. We asked counsel if he knew of a single case in which it had been held that an innkeeper could refuse to take in goods of an ordinary description brought to his inn by a commercial traveller for sale in the neighbourhood. No case of that kind has been cited or could be found, although this business of commercial travellers has been carried on for a very great length of time, and so largely that there is scarcely an inn in England to which commercial travellers do not go with the goods of their employers. That fact is suggestive in considering the contention now put forward. * Further, there is no case to be [* 507] found in the books to show that an innkeeper would not be liable in the ordinary way for the loss of such goods so brought to his inn by a commercial traveller, and so taken in by himself. It is, therefore, clear that, if a commercial traveller goes to an inn with goods as his luggage which are the ordinary goods for sale of a commercial traveller, and the innkeeper takes him and his goods in, the innkeeper's liability in respect of those goods would be the same as in respect of the personal luggage of the traveller. That being undoubted, we have to consider whether the innkeeper's lien is defeated by reason of the fact that when he took the goods in he knew, or had had notice, that they were the property, not of the commercial traveller, but of his employers. The law is stated in *Robinson v. Walter*, 3 Bulstr. 269, by DODDERIDGE, J., when the case first came before him, thus: "This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: he is to receive all guests and horses that come to his inn: he is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for

his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat." That is a distinct statement that this law of an innkeeper's lien is founded on the general custom of the land, and that an innkeeper is not bound to inquire to whom the goods which a guest brings to the inn belong, but is bound to receive them.

The case of *Broadwood v. Granara*, 10 Ex. 417, was chiefly relied on for the appellants. There a guest staying at an inn went to a shopkeeper in the town and hired a piano, which was sent to him at the inn for the purpose of playing on it during his stay there, and the innkeeper knew that the piano was so hired for that purpose, and allowed it to be brought into his inn. The Court held that he had no lien upon it; but the ground of the decision is stated as clearly as possible in the judgments. POLLOCK, C. B., said (at p. 422): "This is the case of goods, not brought to [* 508] the * inn by a traveller as his goods, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that third person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose. Under these circumstances, I am clearly of opinion that the defendant has no lien." PARKE, B. (at p. 423), said: "It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of goods brought by a guest to an inn in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien." Then follow words which are sufficient to determine the case before us: "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound

No. 5. — *Robins & Co. v. Gray*, 1895, 2 Q. B. 508, 509.

to receive.” An analogous case to that was put by the MASTER OF THE ROLLS during the argument of the present case. Suppose a jeweller in the town sent, with the knowledge of the innkeeper, certain jewels to a guest at the inn on approval, and allowed them to remain in the inn for some days — could the innkeeper claim and enforce a lien upon those jewels? I should think he could not, because they were sent for a special temporary purpose, and the innkeeper knew it; they were, therefore, not sent as the goods — I do not mean as the property — of the guest; they were not goods which he was likely to take about with him as his luggage. But in the case before us the goods were received into the inn as the kind of goods with which the guest was accustomed to travel in his employment as a commercial traveller; and they were the *kind of goods which the innkeeper would be [* 509] bound to receive without inquiring — and he had no right to inquire — to whom they belonged. If we were to hold that the innkeeper had no lien upon them we should be effecting a complete revolution in the custom of the land, in accordance with which an innkeeper, who receives into his inn commercial travellers with the goods of their employers which the travellers bring there in the course of their business, is accustomed to believe, and has a right to believe, that he has a lien upon those goods.

A. L. SMITH, L. J. — A commercial traveller went in the course of business to an inn; and, according to the finding of WILLS, J., he took with him goods which “were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the ordinary apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while he was there.” The learned Judge finds in effect that the goods in question were part of the commercial traveller’s baggage, and goods which the innkeeper was bound by the law of the land to take in, and to absolutely preserve as the goods of his guest. That obligation is imposed upon him by the custom of the realm. In consideration of that obligation there is given to him — also by the custom of the realm — a lien upon the goods for the value of the food and lodging supplied to the guest during the time he stays at the inn. I cannot do better than read what LOPES, L. J., said in *Gordon v. Silber*, 25 Q. B. D. 491, at pp. 492, 493: “The innkeeper is under an obligation to keep the goods of a guest received into the inn

safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title." I agree with that; it is good law, and is not disputed in

this case; nor can it be disputed, because it is settled by [*510] authority. But it is said that the law so *stated does not

apply if goods, brought to an inn as the goods and baggage of a commercial traveller, are not his property but the property of his employers, and that fact is known to the innkeeper when he takes the goods in. Counsel for the appellants was asked what case had decided that. He relied on *Broadwood v. Granara*, 10 Ex. 417, which, he said, decided that the innkeeper had no lien where goods were sent to an inn, and he knew that they were not the property of the person staying at the inn to whom they were sent. In my view the case did not decide that at all, because the piano was not sent to the inn as the guest's luggage or baggage; he hired it in the town, and it was sent for him to play upon whilst he stayed at the inn. The Court held that it was not his baggage which the innkeeper by the law of the land was bound to receive. Here the sewing-machines were received as the baggage of the commercial traveller. The question whether he was able to pledge them or not has nothing to do with the matter; the rights and liabilities of the innkeeper depend upon the custom of the realm. Some expressions of Judges were relied on to the effect that an innkeeper had a lien upon goods brought to his inn by a guest, if the innkeeper did not know that the goods were not the property of the guest, but were the property of some one else. There is no decision, however, that if he did know his lien was gone. The illustration may be put of goods received by an innkeeper of which one half belonged to the guest who brought them, and the other half to some one else. Suppose the innkeeper received all the goods with knowledge of the fact; could it be said that he was under any different obligation with respect to the goods which were the guest's and those which were not; so that, as to one half, his obligation was to keep the goods safely and securely, and, as to the other, only to take due care? In my

Nos. 4, 5. — *Threfall v. Borwick*; *Robins & Co. v. Gray*. — Notes.

judgment, the contention made on behalf of the appellants fails, and I agree that this appeal should be dismissed.

Appeal dismissed.

ENGLISH NOTES.

A person keeping a house of public entertainment in London, where provisions and beds were furnished for all persons applying and paying therefor, but which was merely termed a tavern and coffee-house, and was not frequented by stage-coaches or waggons and had no stables attached to it, was held to be an innkeeper, and as such entitled to a lien on the goods of his guests for the payment of his bill. *Thompson v. Lacy* (1820), 3 B. & Ald. 283, 22 R. R. 385. An innkeeper who receives a horse of a person who is not a guest at the inn has no lien upon the horse for the cost of its keep. *Smith v. Dearlove* (1848), 6 C. B. 132, 17 L. J. C. P. 219, 12 Jur. 377; and see as to a livery-stable keeper, who has no lien, *Orchard v. Rackstraw* (1850), 9 C. B. 698, 19 L. J. C. P. 303.

The lien exists only over goods which have been brought or left by a guest. *Binns v. Pigot* (1839), 9 Car. & P. 208.

A man went to an inn with race-horses and a groom in the character of a guest, and remained there for several months, being occasionally absent for several days together, at races in different parts of the country, but always with the intention of returning to the inn. It was held that the relationship of innkeeper and guest must be presumed to continue, and that the occasional absences did not destroy the innkeeper's lien upon the horses for his bill; nor did the fact that the owner sometimes took away the horses for racing or hunting, constitute a presumption that he kept them in the character of a livery-stable keeper: *Allen v. Smith* (1862), 12 C. B. (N. S.) 638, 31 L. J. C. P. 306, 6 L. T. (N. S.) 1284, 10 W. R. 646, 9 Jur. (N. S.) 230; affirmed on appeal, 9 Jur. (N. S.) 1284, 11 W. R. 440. Where an innkeeper received horses and a carriage to stand at livery, the fact of the owner subsequently taking occasional refreshments at the inn, or sending a friend to be put up there at his charge, will not give the innkeeper a lien in respect of any part of his demand. *Smith v. Dearlove* (1848), *supra*.

The lien covers board and lodging and wine supplied to the guest's order, whatever may be the amount: *Proctor v. Nicholson* (1835), 7 Car. & P. 67; *Gordon v. Cox* (1835), 7 Car. & P. 172; and includes money lent by the landlord to the guest, if it was agreed between them at the time of the loans that the guest's goods should be a security for the sums lent: *Proctor v. Nicholson*, *supra*.

The lien is general, and extends to all goods and chattels belonging

to the guest. *Mulliner v. Florence* (1878), 3 Q. B. D. 484, 47 L. J. Q. B. 700, 33 L. T. 167, 26 W. R. 385. Thus, a chattel, although deposited with the innkeeper, and placed by him apart from the personal goods of the guest, may be detained for the amount of the reckoning. *Ib.* Where a husband and wife stayed together at an hotel, and credit was given to the husband, who made payments on account, but left the balance of the bill unpaid, it was held that the hotel proprietor was entitled to detain, as subject to his lien, luggage which was the separate property of the wife. *Gordon v. Silber* (1890), 25 Q. B. D. 491, 59 L. J. Q. B. 507, 63 L. T. 283, 39 W. R. 111.

As appears from the principal cases, the lien extends to goods of a third person brought by the guest. It includes the carriage of a stranger brought to the inn for standing room. *Turrill v. Crawley* (1849), 13 Q. B. 197, 18 L. J. Q. B. 155, 13 Jur. 878. Where a person who had formerly been clerk to an attorney was subpœnaed in an action brought by the attorney to recover the amount of a bill of costs, and put up at an inn, bringing with him a bag containing among other things a letter-book belonging to the attorney, it was held that the innkeeper was entitled to retain the letter-book for his bill against that person. *Snead v. Watkins* (1856), 1 C. B. (N. S.) 267, 26 L. J. C. P. 57.

The principal cases further show that it is immaterial that the innkeeper knew that the goods were not the property of the guest. It is true that in *Broadwood v. Granara* (1854), 10 Ex. 417, 24 L. J. Ex. 1, 1 Jur. (N. S.) 19, it was held that an innkeeper who knew that a piano had been lent to his guest, and was not the guest's property, had no lien upon the piano; but as pointed out in the principal case of *Robins & Co. v. Gray*, No. 5, *supra*, that decision proceeded upon the ground that the piano had not been brought to the inn as the guest's luggage, and was not taken in by the innkeeper in his character as such.

The lien extends to property wrongfully seized under colour of a legal proceeding, unless the landlord knew that the party making the seizure was a wrongdoer at the time it was made. *Johnson v. Hill* (1822), 3 Starkie, 172, 23 R. R. 764.

An innkeeper retaining goods of his guest by virtue of his lien is bound to take such care of them as a reasonably careful man would take of his own: *Angus v. McLachlan* (1883), 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. 863, 31 W. R. 641; and by the rules of common law he cannot realise what is due to him by selling the chattel, such sale being a determination of the lien even though the retention of the chattel is attended with expense: *Mulliner v. Florence* (1878).

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3 Q. B. D. 484, 47 L. J. Q. B. 700. But, under the Innkeeper's Act, 1878 (41 & 42 Vict., c. 38), the landlord is given, in addition to his right of lien, a right, after the goods have been in his charge for six weeks without the debt having been paid, and upon a month's notice, as prescribed by the Act, to sell the goods and apply the proceeds in payment of the amount due to him.

An innkeeper who accepts security from his guest for the payment of hotel charges does not waive his lien at common law upon the goods of the guest for the amount of such charges unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien, and therefore destructive of it. *Angus v. McLachlan* (1883), 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. 863, 31 W. R. 641.

The innkeeper has no lien on the person of his guest, and cannot therefore detain him for any reckoning due; still less has he any right to take any of his clothes off his person as a security for the same. *Sunbolz v. Alford* (1838), 3 M. & W. 248, 1 H. & H. 13, 2 Jur. 110.

AMERICAN NOTES.

The contrary of the Rule is generally held here, without much discussion. *Cook v. Kane*, 13 Oregon, 482; 57 Am. Rep. 28; *Covington v. Newberger*, 99 North Carolina, 523, based on *Broadwood v. Granara* and *Threfall v. Borwick*, 7 Q. B. 711. See also *Betts v. Salisbury* (N. Y. Com. Pl.), 12 Albany Law Journal, 337, to the same effect, relying on *Threfall v. Borwick*, 7 Q. B. 711.

There is no doubt of the landlord's lien if he is ignorant of the real ownership. Cases cited above; *Manning v. Hollenbeck*, 27 Wisconsin, 202; *Grinnell v. Cook*, 3 Hill (New York), 485; 38 Am. Dec. 663. The innkeeper's lien even extends to stolen property. *Black v. Brennan*, 5 Dana (Kentucky), 310.

INSURANCE.

- SECTION I. Insurable Interest.
- SECTION II. Insurance Agents. Their Powers, Rights, and Liabilities.
- SECTION III. Making of the Contract. The Slip. Representation and Concealment.
- SECTION IV. Illegality.
- SECTION V. Inception and Duration of the Risk.
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- (1) General Rules.
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- SECTION VII. Deviation and Change of Voyage.
See DEVIATION (Vol. IX.).
- SECTION VIII. Loss. *Causa proxima spectatur.*
- SECTION IX. Abandonment and Total Loss.
See ABANDONMENT (Vol. I.).
- SECTION X. General Average Loss.
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 SECTION I. — *Insurable Interest.*

 No. 1. — LUCENA *v.* CRAUFURD.
(1802–1806.)

RULE.

A CONTRACT of marine insurance is, in its essence, a contract of indemnity; and, therefore, an interest of appreciable commercial value in the subject of insurance is of the essence of the right to recover upon the contract.

Insurable interest must exist and be averred from the commencement of the risk to the time of loss.

An expectation not involving any right in the nature of property, and not accompanied by possession or any power of disposal, does not confer an insurable interest.

No. 1. — *Lucena v. Craufurd.* — Rule.

Where a foreign ship is taken by an act of Sovereign power, a subject of the Sovereign captor cannot, until condemnation, have any title conferring an insurable interest; but the King may, by reason of his possession, have such an interest.

(IN THE EXCHEQUER CHAMBER.)

Lucena v. Craufurd and others; In Error.

3 Bos. & P. 75-106 (6 R. R. 623).

Insurable Interest.

On an insurance on Dutch ships taken possession of before any declaration of war by Commissioners (commonly called "the Dutch Commissioners") appointed under the powers of an Act of Parliament authorising the Commissioners to take possession, manage, sell, and dispose of the ships: *Held*, by the House of Lords, reversing the decision of the King's Bench and Exchequer Chamber, that, as to one of the ships which was lost after the declaration of war, the Commissioners as such had no insurable interest, because the Act could not affect the King's prerogative; and, as to the ships which were lost before the declaration of war, *semble* (per Lord ELDON), that the Commissioners had no insurable interest, because the Act could not change the property as against foreigners.

But on a second trial, where the interest was averred and found to have been in the King, and the insurance effected by the Commissioners as agents on His Majesty's behalf and by his order: *Held*, that the action was well laid, and that the Commissioners might recover on behalf of the King.

The points determined by Lord ELDON were as follows:—

(1) The seizure of the ships, before coming into a British port, must be taken to have been done as an act of State under the King's prerogative, and not under the Act of Parliament. It was then in the power of the Crown to order them to be restored to the owners, or otherwise dealt with as the Crown should think fit.

(2) After the commencement of hostilities, whether the ships were in a British port or not, — the ships being then enemies' property in the possession of the King's officers, — the Commissioners could not dispose of them as against the Crown, because the act could not be intended to affect the rights of the Crown.

(3) Neither could they have disposed of them as against the foreigners; for, if a ship be taken by hostile force, the title to that ship as against foreigners cannot be changed by any act of local legislation, but the ship must be condemned in a Court proceeding according to the law of nations, on rules binding not only on the subjects of the country where the Court is held, but on foreigners who are not so.

(4) An insurable interest is not created by a mere expectation, but must be a right in the nature of property, or arising out of some contract about the property, or at least a right of possession with powers of disposal.

 No. 1. — *Lucena v. Craufurd*, 3 Bos. & P. 75.

(5) On capture under the King's authority, the King may be considered, as against all the world, as having an interest in the property before condemnation for the purpose of insuring.

(6) A trustee, having a legal interest in the thing, may insure.

(7) A consignee or agent, having the power to sell, may insure.

(8) An agent, having a mere naked right to take possession, may insure, if he states the interest to be in his principal (*semble*).

(9) Insurable interest (under the statute of 19 Geo. II., c. 37) must exist and be averred from the commencement of the risk to the time of loss.

[75] Assumpsit on a policy of insurance.

The first count of the declaration (upon which the verdict was taken) stated, that whereas our sovereign Lord the King, by virtue of the powers vested in him by a certain Act of Parliament, made at a session of Parliament, holden at Westminster, in the thirty-fifth year of his reign, entitled, "An Act to make further provision respecting ships and effects coming to this kingdom to take the benefit of His Majesty's orders in council of the 16th and 21st days of January, 1795, and to provide for the disposal of other ships and effects detained in or brought into the ports of this kingdom," on the 13th day of June, 1795, to wit, at London, &c., did, by and with the advice of his Privy Council, issue his Royal commission under the Great Seal of Great Britain to James Craufurd, J. B., A. C., J. B., and A. B. directed, whereby our said Lord the King did nominate, constitute, and appoint them commissioners for the purposes mentioned in the said Act, and did authorise and require them to take all such ships and cargoes, goods, wares, merchandises, and effects, into their possession and under their care, as His Majesty could or might by virtue of the said Act authorise them to take into their possession, and under their care, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they, the said J. C., &c., should from time to time receive from his said Majesty, his heirs and successors, with the advice of his and their Privy Council, and otherwise, in all respects, according to the said Act; and also to give such directions respecting the proceeds of the sale or sales of any cargoes or parts of cargoes mentioned in the said Act to have been ordered to be sold, as the commissioners to be appointed by virtue of the said Act were therein and thereby required and authorised to give respecting the same, thereby also giving and granting to them the said J. C., &c., all and singular

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such powers and authorities, and authorising and empowering them to do, execute, and perform all and singular such duties and matters and things as his said Majesty could or might give or grant, authorise * or require to be done, executed, [* 76] or performed, by the commissioners to be appointed by his said Majesty in pursuance and by virtue of the said Act. And whereas before the making of the several writings or policies of insurances hereafter mentioned, to wit, on the 10th day of June, 1795, certain ships called the *Houghley*, *Alblassendam*, *Dordrecht*, *Zeelelie*, *Meermin*, *Agatha*, *Mentor*, and *Surcheance*, with cargoes of goods and merchandises on board the same, respectively, being ships, goods, and merchandises belonging to subjects and inhabitants of the United Provinces, coming from certain parts of Asia and Africa, and bound to certain parts of the United Provinces, were by his said Majesty's orders seized and taken at sea in their said voyage from Asia and Africa to the said United Provinces by the commander of one of His Majesty's ships of war in company with some ships in the service of the United Company of Merchants of England trading to the East Indies, in order and to the intent that such ships, goods, and merchandises might be brought into the ports of this kingdom; and such ships with such goods and merchandises on board the same, respectively, had been carried into St. Helena for the purpose of being brought from thence to some port or ports in this kingdom, to wit, at, &c.; and the said ships, goods, and merchandises, so having been carried into St. Helena aforesaid, and the said J. C., &c., so being such commissioners so appointed and authorised as aforesaid, the said J. C., &c., afterwards, to wit, on the 22nd of August, 1795, to wit, at, &c., according to the usage and custom of merchants, caused to be made and effected a certain writing or policy of assurance, purporting thereby and containing therein that the said J. C., &c., by the name, firm, and description of the Honourable the Commissioners for sale of Dutch property, the same then and there being their usual style and firm of dealing, as well in their own name, &c., did make assurance, &c. The declaration proceeded to set out a policy in the usual form on the above-mentioned ships, and to state the undertaking of the plaintiff in error to become an insurer, and his subscription to the policy. It then averred that notice of the losses and misfortunes which befell the said ships and goods, as hereafter mentioned, arrived in this kingdom before

any declaration and valuation was or could be made of the said ships and goods, to wit, at, &c. That the ships were in good safety at the time mentioned in the policy. It also alleged [* 77] that the said ships * and goods were ships and goods which, if they had arrived at London aforesaid from the said voyage, the said J. C., &c., as such commissioners as aforesaid, were and would, upon such arrival, have been authorised to take into their possession and under their care, and to manage, sell, and dispose of the same according to the form and effect of the said commission and Act of Parliament, and which were intended to be brought from St. Helena aforesaid to London aforesaid, for those purposes in the said writing or policy of assurance mentioned, to wit, at, &c.; and that the said J. C., &c., as such commissioners as aforesaid, under and by virtue of the said Act of Parliament, and the said commission at the time of the sailing of the said ships from St. Helena as hereinafter mentioned, and from thence, until, and at the times of the several losses hereinafter mentioned, were interested in the said ships and goods to a large amount, to wit, to the amount of all the money by them ever insured thereon; and that the said insurance so made as aforesaid was so made to and for their use, benefit, and account, as such commissioners as aforesaid. The declaration further stated that the ships set sail from St. Helena for England before the 22nd of August, 1795, viz., on the 2nd [2 Bos. & P. N. R. 270] of July, 1795; that the *Houghley*, with part of her cargo, was lost by perils of the seas on the 1st of September, 1795; that the *Surcheance* and her cargo were lost by perils of the sea on the 5th of September, 1795; that the *Dordrecht* was disabled by perils of the sea on the 13th of September, 1795, but was carried into Ireland, and there sold, and the cargo brought to London; and that the *Zeelelie* was lost by perils of the sea on the 20th of September, 1795: [3 Bos. & P. 77] whereby the assured sustained an average or partial loss to a large amount, to wit, to the amount of £40, upon every £100 insured. [1 Taunt. 328] There was a second count, similar to the first, except in the averment of interest, which was as follows: "That on the 2nd of July, and from thence until, and at the times of, the several losses, His Majesty was interested in the ships and goods to the amount of all the money by the plaintiffs,

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as such commissioners, for and on account of His Majesty ever insured thereon; and that the insurance was so made by them as such commissioners for the use, benefit, and account of His Majesty, and that they were the persons who gave the order to the agent immediately employed to negotiate and effect the policy." There was a third count, averring that the ships at the time of the insurance on loss belonged to foreigners.

To this declaration the defendants below [3 Bos. & P. 77] pleaded the general issue. The cause came on to be tried before Lord KENYON, Ch. J., and a special jury at the Guildhall Sittings after Michaelmas Term, 1799. His Lordship having directed the jury to find a verdict for the plaintiffs below upon the first count of the declaration, a bill of exceptions was tendered, from which, when annexed to the record in this Court, the case appeared to be as follows:—

The plaintiffs below gave in evidence a commission under the Great Seal, dated the 19th of June, 1795, which (after referring to the provisions of the 35 Geo. III., c. 80, respecting ships and effects belonging to subjects of the United Provinces detained in or brought in, or to be detained or brought into the ports of this kingdom; and after reciting that several such ships had been or might be thereafter detained in or brought into the ports of this kingdom) appointed the plaintiffs to take all such ships, cargoes, &c., into their possession and under their care, as the Crown was *empowered to seize under the said Act, and to manage, [*78] sell, and dispose of the same to the best advantage, according to such instructions as they should from time to time receive from His Majesty, with the advice of his Privy Council, and to dispose of the proceeds, and to do everything which the Crown could authorise them to do by virtue of the said Act. They then gave in evidence certain instructions under the sign manual to the commanders of His Majesty's ships of war and ships carrying letters of marque, dated the 9th of February, 1795, directing them to bring into the ports of this kingdom all Dutch vessels bound to or from any ports in Holland, in order that they, together with their cargoes, being Dutch property, might be detained provisionally; and that speedy restitution should be made of all cargoes belonging to the subjects of allied or neutral powers. They then proved that the ships mentioned in the policy, before the time when the policy was effected, viz., on the 10th of June,

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1795, were Dutch ships, and that they, with their cargoes, also Dutch, were coming from certain parts in Asia and Africa to certain ports of the United Provinces, and were, by virtue of the above instructions, seized by Captain Essington, the commander of the *Sceptre*, man of war, in company with some ships in the employment of the East India Company, and carried into St. Helena for the purpose of being brought into this kingdom. They also proved the defendant's subscription to the policy; that he had notice of the loss before any valuation could be made; that the policy was effected on account of the plaintiffs as such commissioners as aforesaid; that the ships sailed from St. Helena on the 2nd of July, 1795, and that they were lost in the manner stated in the declaration, in consequence of which the assured sustained an average loss. The defendant on his part gave in evidence an order of Council, dated the 13th of June, 1795, which, after reciting that by the powers vested in the Crown by the before-mentioned Act His Majesty had issued his commission to the plaintiffs authorising them to take the ships and cargoes of Dutch subjects, which had been or might thereafter be brought into the ports of this kingdom, into their possession and under their care, and to manage and dispose of them to the best advantage, according to such instructions as they should from time to time receive from His Majesty, with the advice of his Privy Council, directed them forthwith to take into their possession and care all [* 79] such * ships, &c., according to the lists thereof which they should from time to time receive from the Commissioners of the Customs in England and Scotland, in pursuance of directions transmitted to them by the Lords of the Treasury; together with other directions not material to this case. He then gave in evidence the King's Proclamation for general reprisals against the ships, goods, and subjects of the United Provinces, dated the 15th of September, 1795. He next produced an order of Council, dated the 26th of November, 1795, which, after stating that the four Dutch East India ships, viz., the *Blessendam*, the *Agatha*, the *Mentor*, and the *Dordrecht*, then lying in the river Shannon, in the kingdom of Ireland, were sent in there by His Majesty's ship *Sceptre* antecedent to the order for granting general reprisals against the ships of the United Provinces, and that agents had been appointed by William Essington, Esq., the commander of the *Sceptre*, and others, concerned in sending in

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the said vessels, and that the sole interest in all ships so sent in was vested in His Majesty, and the appointment of agents for the care and disposal thereof did of right belong to him, appointed the plaintiffs to be the agents on behalf of His Majesty for the care and management of the said four Dutch ships and their cargoes. The defendant also proved that the plaintiffs took possession of the above four ships in the kingdom of Ireland. He then gave in evidence certain proceedings in the High Court of Admiralty against each of those ships, and sentences of condemnation, pronouncing each of "the said ships and cargoes to have been taken before the declaration of hostilities against the Dutch, and to have then belonged to subjects of the States General of the United Provinces, now the enemies of the Crown of Great Britain, and as such or otherwise subject and liable to confiscation." Lastly, he gave in evidence certain instructions from His Majesty to the said High Court of Admiralty, dated the 10th of October, 1795, which, after reciting the before-mentioned Act, enabling the King to grant a commission to three or more persons to take into their possession and manage, &c., all such Dutch ships which might be thereafter detained in or brought into the ports of this kingdom, and reciting that such a commission had issued, and that since the issuing of the commission His Majesty had thought fit to order general reprisals against the ships, &c., of the United Provinces, and to issue a commission authorising the Lords of the Admiralty to take cognisance of all captures, &c., *directed [*80] the said High Court of Admiralty to "proceed to the adjudication of such ships, &c., of which possession had been taken or should be taken by the said commissioners, as should be proceeded against by the King's Advocate-General, in order that the same might be condemned to the Crown as good and lawful prize, reserving, nevertheless, to the said commissioners the sale, care, and management thereof, as well before as after final adjudication, according to the provisions of the said Act."

Upon this evidence the counsel for the defendant insisted that the plaintiffs could not maintain their issue, because the said ships mentioned in the policy of insurance in the first count of the declaration were not ships which, if they had arrived at London from the said voyage therein mentioned, the said plaintiffs, as such commissioners, would have been authorised to take into their possession and under their care, according to the effect

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of their commission, and the Act of Parliament mentioned in the first count of the declaration, and because upon the evidence produced it appeared that the plaintiffs as such commissioners under the said Act and commission were not at the time of the sailing of the said ships from St. Helena as in the first count of the declaration mentioned, from thence, until, and at the time of the several losses therein also mentioned, interested in the said ships or goods, or either of them, to any amount or in any manner whatsoever, so that a legal and valid assurance could be effected by the plaintiffs as such commissioners on their own account; and that the insurance so made, as in the first count of the declaration mentioned, was not made to and for the benefit and on the account of the plaintiffs as such commissioners according to their allegation. Lord KENYON, however, directed the jury that in point of law the plaintiffs had maintained their issue, and the jury accordingly found a verdict for the plaintiffs on the first count of the declaration.

The assignment of errors was conformable to the objections taken at the trial.

This case was argued three times: first, in Michaelmas Term, 1800, by Giles for the plaintiffs in error, and Wood for the defendants in error; secondly, in Hilary Term, 1801, by Law for the former, and Gibbs for the latter: after these two arguments, Lord ELDON, before whom, as Chief Justice of the Common Pleas, the case was debated, having been made Lord Chancellor, and [*81] Lord *ALVANLEY having succeeded him as Chief Justice of the Common Pleas, a further argument was desired by the Court; and accordingly, in Michaelmas Term, 1801, the case was argued by Erskine for the plaintiffs in error, and Park for the defendants in error.

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A majority of the Judges — GRAHAM, B., ROOKE, J., HEATH, J., THOMPSON, B., MACDONALD, Ch. B., and Lord ALVANLEY, Ch. J. — were of opinion that the judgment of the King's Bench should be affirmed.

CHAMBRE, J., was of a contrary opinion.

[106] The judgment of the Court of King's Bench was accordingly affirmed.

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(IN THE HOUSE OF LORDS.)

Lucena v. Craufurd and others ; In Error.

2 Bos. & P. (N. R.) 269–330.

A writ of error having been brought to revise the [269] judgments of the Courts of King's Bench and Exchequer Chamber, given for the defendants in error upon the above-mentioned bill of exceptions :—

The plaintiff in error having assigned the same errors as [270] in the Exchequer Chamber, prayed that the judgment of that Court might be reversed, for the following, among other reasons :—

1st, Because a policy of insurance being both in form and in substance a contract of indemnity, the party who claims the benefit of indemnification under it must show that a loss has been sustained by him upon the subject insured, and for that purpose must necessarily prove that he had at the time some right of property in that subject susceptible of loss or damnification.

2nd, Because there is a material distinction between a contract of wager and a contract of insurance ; the first may have for its subject any speculative chance or expectation, however vague or uncertain, and may be claimed without proof of loss or damage having accrued to the party for whose benefit it is demanded ; but a contract of insurance cannot have such chance or expectation for its object, because bare chance or expectation, * though liable to failure and disappointment, are not [* 271] susceptible of loss or damnification, and therefore cannot be made the objects of an indemnity, which presupposes the loss of some right of property, either in possession or in action.

3rd, Because in the first count of the declaration it is alleged by the defendants in error that they, as commissioners under and by virtue of the said Act of Parliament, and the said commission at the time of the sailing of the said ships from St. Helena, and from thence until the time of the losses, were interested in the said ships and goods to the amount of the money insured, and that the insurance was made for their use, benefit, and account, as such commissioners. This is a material allegation, importing that the object of the insurance was an interest which the defendants in

error themselves had, and disavowing its having been effected for the use, benefit, or account of any other persons. In maintenance of such averment the defendants in error are bound to prove an interest in themselves, which will support an insurance made on their own account, and proof of an interest in other persons for whose benefit they might have made an insurance, cannot, upon this record, avail them.

4th, Because in legal language "to be interested in" or "to have an interest in" any given property does not merely denote an anxiety or solicitude for, or even an expected benefit from, its preservation. But it imports a right of property in it, either general or special, in possession or in action, defeasible or indefeasible. No other interest is capable of being vindicated either in law or in equity, or is susceptible of loss or damnification, and therefore no other can be made the subject of a contract of indemnity.

5th, Because the authority, power, and interest of the defendants in error, as commissioners, is founded upon [* 272] * and circumscribed by the Act of 35 Geo. III., c. 80, s.

21; and the commissioners granted by His Majesty neither did nor could exceed the powers given by that Act. The defendants in error are thereby authorised to take into their possession and under their care all ships and cargoes belonging to the inhabitants of the United Provinces, which had then been, or might thereafter be, detained in or brought into the ports of this kingdom. The power, authority, and interest of the defendants in error is confined to ships and cargoes "detained in or brought into the ports of this kingdom:" beyond that description of property they had neither power, authority, nor interest. As agents they had no other ships or cargoes to take care of, and as commissioners they could not have property or interest in any, except those which the statute and their commission had actually attached upon. When the ships in question sailed from St. Helena they had not been detained in or brought into the ports of this kingdom, and did not come within the description of property in or over which the defendants in error had any sort of interest, power, or authority. It is not therefore true, as they have alleged, that they as commissioners were interested in the said ships and goods, at the time of their sailing from St. Helena, though they might possibly be anxious and solicitous for, and expect a benefit from,

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their being brought into the ports of this kingdom, and thereby placed under their power and authority. As commissioners they could not possibly have any other description of interest in these ships or cargoes before their arrival in England.

6th, It is stipulated by the policy that the adventure on the goods to be insured by it should begin from their being loaded on board the ships at St. Helena. The loading of the goods at St. Helena is therefore a condition precedent to the inception of the risk upon them, and it not appearing upon the record that this condition *has been complied with, but, on [* 273] the contrary, it being stated in the declaration, by the defendants in error, that the goods were not loaded at St. Helena, the plaintiffs in error cannot be compelled to perform their part of the contract.

T. ERSKINE.

D. GILES.

The defendants in error prayed that the said judgment might be affirmed, for the following, among other reasons:—

1st, Because the ships and goods whereon the assurance was made were ships and goods belonging to the inhabitants of the United Provinces, intended and directed by His Majesty to be brought into the ports of this kingdom, and under the circumstances in which they stood, when they were insured, would, if they had arrived in this kingdom, have come to the possession, and been under and subject to the management, sale, and disposition of the defendants in error, as commissioners by virtue of the before-mentioned commission and Act of Parliament, which in express terms authorised them to take into their possession and under their care, and to manage, sell, or otherwise dispose of, ships, goods, and effects belonging to the inhabitants of the United Provinces, which had been or might be detained in, or brought into the ports of this kingdom; and although those ships and goods were (after making the insurance, upon the breaking out of hostilities between this kingdom and the United Provinces) condemned in the High Court of Admiralty as prize, yet that did not vary the destination or disposition of those ships and goods, especially as His Majesty, in his instructions to the Court of Admiralty for the adjudication of such ships and goods as prize, has expressly reserved to the defendants in error the care,

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[* 274] sale, and management thereof, as well * before as after final adjudication, according to the provisions of the said Act.

2nd, Because the defendants in error (in the event of the ships and goods insured coming into this kingdom) were, by the Act of Parliament and commission, constituted trustees or consignees thereof, and would have had a power to take them into their custody, and to manage, sell, or otherwise dispose of them for the benefit of His Majesty, or such others as might be beneficially entitled thereto; and nothing but the perils and dangers insured against by the policy could prevent those ships and goods from actually coming to the custody, possession, and power of the defendants in error under the Act of Parliament and commission. Such a contingent interest, it is submitted, is an interest upon which a legal and valid assurance may attach, the object of it not being gaming or wagering, but really and *bonâ fide* to secure to the defendants in error, as trustees or consignees for others, the benefits which would accrue if the insured property arrived, and which would be lost if that property were lost.

V. GIBBS.

J. A. PARK.

G. WOOD.

The case was argued during Trinity Term, 1804, at the Bar of the House, by Erskine and Giles for the plaintiff in error, and by Gibbs and Park for the defendants in error.

On the motion of the LORD CHANCELLOR (ELDON) the following questions were proposed to the learned Judges on the 4th of February, 1805:—

1st, Whether, regard being had to the true meaning and legal effect of the Act of the 35th year of His Majesty's reign, in the first count of the declaration mentioned, and the royal [* 275] commission in the said count mentioned, * bearing date the 13th day of June, 1795, it was or was not in law competent to His Majesty to order the several ships, goods, and merchandises in the said first count mentioned as belonging to subjects or inhabitants of the United Provinces, and therein mentioned to have been taken and seized at sea by the commander of one of His Majesty's ships of war, to the intent that the same might be brought into the ports of Great Britain to be restored

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(after the same had been so taken and seized) to the subjects and inhabitants of the said United Provinces to whom they respectively belonged, either whilst such ships and goods were upon the voyage in the said count mentioned, and before they were brought into the ports of Great Britain, or upon their arrival in such ports, or to order and direct such ships and goods to be carried into any ports of Great Britain?

2nd, Whether, according to the true intent, meaning, and legal effect of the said Act of Parliament and commission, and regard being had to His Majesty's legal right and interest in the property of enemies taken and seized before hostilities, but remaining at the time when hostilities take place in possession of those who by his orders had previously taken and seized the same, the plaintiffs in this case, as such commissioners, as in the first count of the declaration mentioned, had any and what legal interest in or authority to take into their possession and under their care, and to manage, sell, and dispose of, according to the said Act of Parliament and commission, and such commission as aforesaid, all or any of the ships mentioned in the said count, or their cargoes, which arrived in the ports of Great Britain after the issuing of His Majesty's proclamation of the 15th day of September, 1795, proved and given in evidence to the jury in this cause, or after hostilities were commenced by His Majesty against the United Provinces in the declaration mentioned?

* 3rd, Whether upon the matters appearing to have been [* 276] produced and given in evidence in this cause, if true, the plaintiffs, notwithstanding such Act and commission as aforesaid, were duly and effectually constituted agents on behalf of His Majesty, for the care and management of such of the several Dutch ships mentioned in the order of council of the 26th of November, 1795 (given in evidence in this cause), to have been sent into the kingdom of Ireland, as are mentioned in the 1st count of the said declaration, and in the said order, and the sole interest in which ships so sent in is by the said order alleged to be vested in His Majesty. And whether after such order, and after the plaintiffs took possession in Ireland, and after such declaration of hostilities as aforesaid, the authority of the plaintiffs to continue such ships under their care and management in Ireland, or in Great Britain, was an authority to be considered in law as vested in them as such commissioners; as in the declara-

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tion mentioned by virtue of the said Act of Parliament and commission aforesaid, or as agents appointed by the said orders in council, regard being had to the effect of the said proclamation of the said 15th September, 1795, and the proceedings and sentences of the High Court of Admiralty given in evidence in this cause.

4th, Whether upon the several matters produced and given in evidence to the jury in this cause, if true, the said ships and goods in the declaration mentioned to have been lost, as to each of the said ships respectively, and the goods laden on board each of them respectively, regard being had to the respective times of the losses thereof, as stated in the first count of the declaration, and the date of such proclamation as aforesaid, and all the matters produced in evidence, and to such orders and directions, if any, as His Majesty might lawfully give respecting the restoration thereof to the subjects and inhabitants of the United Provinces, to whom [* 277] they had belonged, * or respecting their destination to other ports than those of Great Britain, were ships and goods which, according to the legal meaning of the averment in the said first count in the said declaration, if they had arrived at the port of London from the voyage in the declaration mentioned, the plaintiffs as such commissioners as in the declaration mentioned, were and would, upon such arrival, have been authorised to take into their possession and under their care, and to manage, sell, and dispose of, according to the effect and form of the said commission and Act of Parliament, as the plaintiffs have in the first count of their declaration alleged?

5th, Whether upon the several matters so produced and given in evidence, if true, and such regard being had as aforesaid, the plaintiffs, as such commissioners as aforesaid, under and by virtue of the said Act of Parliament and commission, were, at the time of the sailing of the ships in the said count of the declaration mentioned respectively, from St. Helena, as in the said count is mentioned, and from thence, and until, and at the time of the several losses herein mentioned, interested in the said ships and goods in any and what manner, and according to the legal meaning of the said word "interested," as used in the first count of the declaration; so that a legal and valid assurance could be effected on the said goods, and on the bodies of the said ships, by the plaintiffs as such commissioners for their use, benefit, and account as such commissioners?

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6th, Whether if the said several averments, or either of them according to the legal import thereof, are or is not made good by the several matters produced and given in evidence in this cause on the part of the plaintiffs, the plaintiffs can, in point of law, be considered as having maintained the issue on their parts? And whether such averments, or either of them, are unnecessary to be made good in this case, or can be rejected as surplusage? Whether, after the passing of the 19 Geo. II., c. 37, it was

* necessary in the law in a declaration in an action brought [*278] upon a policy of assurance effected upon a British ship for the plaintiff in such action, to make any averment touching his interest therein, which was not necessary to be made in such declaration previous to the passing of that Act of Parliament?

7th, Whether the said plaintiffs, as such commissioners as in the said first count of the said declaration mentioned, had in law any such interest in the bodies of the said ships respectively, and goods laden therein respectively and assured, as was capable of being abandoned by them in any circumstances as such commissioners or otherwise to the assurers, and more especially after the issuing of the said proclamation of the 15th September, 1795; and if not, whether their incapacity to make such abandonment does in law in any manner affect the validity of the assurance stated by the said first count to have been made as therein is mentioned?

8th, Whether assuming that the plaintiffs, as such commissioners as aforesaid, would be entitled to a reasonable recompense or profit for service to be performed in respect to the ships and goods in the first count mentioned, in case the same should arrive in a British port, their title to such recompense or profit was by law insurable against marine risks happening antecedent to their arrival, and consequently previous to the period of such service? And in case the same was by law insurable, was it necessary that the assurance should be made conformable to the enactment in the first section of the Act 19 Geo. II., c. 37? And can the policy of assurance in the first count of the declaration in this case stated be considered as a policy effected on such interest of the commissioners, if such they had, and the same is an insurable interest?

The learned Judges not being agreed upon all the answers to be given to the above questions, delivered their * opinions in the following order, on several days, in the [*279] months of June and July, 1806:—

GRAHAM, Baron,¹ CHAMBRE, J., LE BLANC, J., LAWRENCE, J., ROOKE, J., GROSE, J., THOMPSON, Baron, HEATH, J., M'DONALD, Ch. Baron, and Sir JAMES MANSFIELD, Ch. J., of the Common Pleas.

Upon the first question, the learned Judges were unanimously of opinion that it was in law competent to His Majesty to order the several ships, goods, and merchandises in the first count of the declaration mentioned to be restored to the subjects and inhabitants of the United Provinces, to whom they respectively belonged, either while such ships and goods were upon the voyage, and before they were brought into the ports of Great Britain, or upon their arrival in such ports, or to order such ships and goods to be carried into any ports other than the ports of Great Britain.

[280] To the second question, GRAHAM, Baron, ROOKE, J., GROSE, J., HEATH, J., and Sir JAMES MANSFIELD, Ch. J., answered in the affirmative.

[283] CHAMBRE, J., LE BLANC, J., LAWRENCE, J., THOMPSON, B., and MACDONALD, Ch. B., answered in the negative.

[* 287] * To the third question, GRAHAM, B., ROOKE, J., GROSE, J., HEATH, J., and MANSFIELD, Ch. J., answered in the affirmative, that the plaintiffs were duly constituted prize agents of the Dutch ships sent into Ireland, and that they exercised their authority in Ireland in that character; but that their appointment as prize agents in Ireland was not inconsistent with nor in any respect intended to revoke or abridge their power as commissioners in England. And that as soon as the four ships mentioned in the declaration were brought by the King's orders into the ports of England, their authority as commissioners attached upon them.

CHAMBRE, J., LE BLANC, J., LAWRENCE, J., THOMPSON, B., and MACDONALD, Ch. B., answered, that the plaintiffs were duly constituted prize agents of the said ships, and that their authority to continue such ships under their care and management as well in Great Britain as in Ireland, was vested in them as agents appointed by order of council, and not as commissioners under the Act.

To the fourth question, GRAHAM, B., ROOKE, J., GROSE, J., HEATH, J., LE BLANC, J., and Sir JAMES MANSFIELD, Ch. J., answered in the affirmative.

¹ Mr. Baron SUTTON not having been upon the bench at the time when the case was argued, gave no opinion.

CHAMBRE, J., answered in the negative. [288]

LAWRENCE, J., THOMPSON, B., and MACDONALD, Ch. B., said that as the *Zeelelie* was not lost till after hostilities, the commissioners would not have been entitled to take possession of her if she had arrived, inasmuch as she could not arrive till after the proclamation. And with respect to the other ships, as they come within the description * of the Act of Parlia- [* 289] ment and commission, if they had arrived before the proclamation or any order for restoration, they would have been ships of which the commissioners would have had a right to take possession within the legal meaning of the averment, but not if the proclamation or any such order had been made before their arrival.

To the fifth question, GRAHAM, B., LE BLANC, J., ROOKE, J., GROSE, J., HEATH, J., MACDONALD, Ch. B., and Sir JAMES MANSFIELD, Ch. J., answered in the affirmative as to all the ships, and argued in substance as follows: The subject of the present insurance being the ships and goods themselves, and not any profit or commission expected to arise from the sale, management, or disposition of them, the arguments which are founded upon the uncertainty of such interests may be laid out of the question. There can be no doubt that the ships and goods were insurable: but the question is, Whether the commissioners had a sufficient interest in those ships to authorise them to effect the insurance? The peculiar circumstances which attended the property insured are stated in the declaration: the Act of Parliament and commission are referred to; the seizure of the ships at sea for the purpose and to the intent of their being sent to this country and put into the possession of the commissioners is stated, and that the plaintiffs effected the policy on those ships by name, not naming themselves individually as making the insurance, but as commissioners for the sale of Dutch property. It is with reference to these premises they aver, that they as such commissioners were interested, and that the insurance was made for their use and benefit as commissioners. The nature of their connection with the property insured appears from the previous part of the declaration. They claimed no beneficial interest in it: they were merely consignees, agents, * or trustees for others; [* 290] and to make the whole declaration consistent, the averment must be taken to import, what the words will fairly admit, that the insurance was made for the benefit of those for whose

benefit the plaintiffs were authorised by the Act of Parliament and commission to manage the property as consignees; that is, in the present instance, for the King. A consignee without any beneficial interest in himself is agent for the consignor, and may insure for his benefit: and if such a consignee were to state in his declaration the circumstances of the consignment of goods to him to manage, sell, and dispose of for certain persons abroad, might he not aver the interest in himself as such consignee; and would not such an averment, coupled with the disclosure of his having no interest but for the consignor's use, be equivalent to an averment of interest in his consignors? If the words, "for their use and benefit," should be thought repugnant to this construction, those words may be rejected as surplusage; for the averment is to be construed according to the apparent intention, according to the rule, *ut res magis valeat quam pereat*. Besides, upon the arrival of these ships the whole legal interest would have vested in the commissioners, though subject to the trusts specified. And as the law does not regard the use or trust of a chattel, they were at liberty in insuring to aver the interest in themselves. It was the clear intention of the Act of Parliament and commission that the commissioners should have the care and management of these ships and goods in as effectual a manner as the owners would have in ordinary cases; and they would certainly fall very far short of their purpose if they did not extend to give the commissioners a power to insure. The operation of the Act and commission was to constitute the commissioners parliamentary trustees or consignees of the property; and vested in them an insurable interest for the benefit of those who might ultimately be entitled.

[* 291] * To such persons, whoever they might be, the plaintiffs having insured in their character of commissioners, would be accountable for the produce of the insurance, as much as for the sale of the property itself if it had arrived. It was their duty to provide for the security of the property till the event should happen which would enable them to take possession; and in insuring they only followed the provisions of the Act of Parliament, and the commission founded upon it. The Dutch owners knowing nothing of the situation of the property could make no insurance. But if the commissioners were trustees, they were authorized to act, respecting the property, as if it was their own, for the manifest benefit of the *cestui que trust*. If the commis-

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sioners had been ordered by the Crown to insure, there can be no doubt that it would have been their duty to have obeyed; and whether they had any directions is a matter of private trust, not now to be inquired into. The insurance being for the benefit of those ultimately entitled, the approbation of the Crown may be presumed. It is not necessary to consider whether if a mere stranger were to insure a ship, and such insurance were afterwards to be ratified by the owner, it would be valid. But there does not appear to be any rule of law to prevent it. It is not against the 19 Geo. II. The insurance would be made by such person *bonâ fide* as agent for the owner, and if ratified why should it not, like any other contract, be binding on the parties? If this be so with respect to a private individual having no connection with the property, *à fortiori* the insurance by these commissioners must be good. Though a consignee be usually appointed by bill of lading, it is not necessary to invest a person with that character. Mr. Justice BULLER, in the case of *Wolff v. Horncastle*, 1 Bos. & Pul. 322 (p. 272, *post*), defines a consignee to be a person residing at the port of delivery, to whom the goods are to be delivered on their arrival. A consignee, as distinguished from a vendee, is *the mere agent of the consignor; and such a [*292] consignee may be appointed to any direction, verbal or written, to the captain to deliver the goods to such particular person, or by a letter to the person himself, requesting him to take care of the goods upon their arrival. Where, then, is the difference between such a consignee and these commissioners? The ships were directed by the person who had the possession and power to direct the voyage to Great Britain; and the commissioners were appointed to receive the ships and cargoes, and to manage and dispose of them upon their arrival. What is the effect of the most solemn appointment of a consignee different from this? What greater interest, or closer connection with the ship, does he acquire? If, then, there be no difference, no one ever questioned that a consignee or agent of the description spoken of might make an insurance for the benefit of the owner and person entitled, and for whom he as consignee is authorized to act. But the interest of the commissioners is objected to on account of its contingency: that it depended upon the continuance of His Majesty's intention, and that if the King had thought proper to restore these ships to the Dutch owners, or to alter their desti-

nations, the authority of the commissioners would never have attached. But a vested interest is not necessary to give the right of insuring. The commissioners had a contingent interest; and supposing the intentions of the Crown to remain unaltered, nothing stood between them and the vesting of that contingent interest but the perils insured against. It is stated that they cannot be entitled to an indemnity; for they had nothing to lose. But, in fact, they lost by the perils of the sea what but for those perils would have vested in them absolutely. At the time both of the insurance and the loss, their title, like that of a consignee, was inchoate: occupancy was necessary to perfect it. It is true that

their interest was revocable; but so is that of a consignee.

[* 293] The owner * may at any time appoint another consignee or agent; he may change his intention in the course of the voyage. It is very common to direct the captain to touch at particular ports for new instructions. The powers of a consignee, therefore, are not more permanent than those of the commissioners. Many instances, also, may be put of contingent consignments; as a consignment to A., at London, if the ship loses her market at Calais; or to A., if living when the goods arrive, and if not, to B.; or to A. upon condition that he accept certain bills; in all these cases, and many others, as if the consignee became insolvent, and the goods are not paid for or the importation be prohibited by the government of the country; the interest may be prevented from vesting by other events than the perils insured against, and yet this possibility of countermand will not prevent the consignee from insuring. Where there is an expectancy coupled with a present existing title, there is an insurable interest. It is argued that the title of the commissioners was contingent, because the ships which were the subject of their authority might never arrive. But although it was matter of contingency whether any ships would arrive upon which this right could operate, the right itself was not contingent. Antecedent to the arrival of any ships, the commissioners were invested with a right to take into their possession all ships of the description mentioned in the Act of Parliament which should arrive; and it might as well be insisted that the power of justices of the peace, or of the Judges of assize, who act under a commission from the Crown, was contingent, because no felony might be committed which could be the subject of their jurisdiction. The interest of the commissioners was very

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different from that of a prize agent, where the title to its profits arises from meritorious services to be performed at the end of the voyage; and from that of the next of kin of a lunatic, who at the end of the voyage * would have no interest [* 294] whatever, and who eventually may never have any interest, because the lunatic may survive him. Inchoate rights founded on subsisting titles, unless prohibited by positive laws, are insurable. Freight, *respondentia*, and bottomry are of this description; the profit is prospective, but they are founded on existing charter-parties, bonds, or agreements. Wages of seamen are in their nature insurable, though universally prohibited to be insured on principles of policy. The case of *Le Cras v. Hughes*, Park Insur. 269, was a case of mere expectation, and the circumstances were not near so strong in favour of the assured as the circumstances of this case. The doctrine there laid down by that great expositor of marine law, Lord MANSFIELD, twenty-four years ago, has been recognised as law in subsequent cases; and if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds. The interest of the captain in *Le Cras v. Hughes* was not certain; yet it was all but certain that the property would be given according to the custom of the Crown in such cases: Captain Luttrell had an interest for which he would not have taken £20,000; and it would be a strange thing that he should not be allowed to insure that interest against the perils of the sea. There is a decision in a foreign court of prize very nearly corresponding with *Le Cras v. Hughes*, in 2 Valin, article 15, fo. 57. By the French ordinance future profits were prohibited to be insured. The author, in commenting on the article, says, "It is not a future profit to insure a prize already taken, although the prize be not acquired with certainty until it be brought within the ports of the realm;" and then cites an adjudication by the Parliament of Aix. At common law a possibility may be transferred, and devised; and if * so, why may it not be insured? [* 295] The commissioners might have sold these ships while at sea, subject to the contingency; and it would then be most extraordinary if they could not insure them. Suppose that power had been given to the commissioners to sell the ships upon their arrival for their own benefit, subject to the right of the Crown to

restore them or alter their destination. Could it then be contended that the commissioners would have no interest, or that they would not be damnified by their loss at sea? Yet whatever interest they would have had for themselves in that case, they had in this as trustees for others. The ancient definitions of insurance do not exclude contingent interest. The definition in Valin, sur article 1 mo. fo. 26, is, "Assecuratio est conventio de rebus tuto aliunde transferendis pro certo præmio, seu est aversio periculi." In Loccen. lib. 2, c. 5, note, "Aversio periculi, ita dicta quod alterius periculum in mari aversum it; aut in se recipit." In Roccus, "Assecuratio est contractus quo quis alienæ rei periculum in se suscipit obligando se sub certo pretio ad eam compensandam si illa perierit. Ideo valet pactum ut si merces salvæ venierint in portum solvatur certa summa, si vero illæ perierint teneatur assecurator solvere damnum vel æstimationem istarum mercium." These definitions clearly embrace a contingent interest, which is subject to the perils of the sea, and for the loss of which a compensation may be made. All that these definitions require is that the insured shall be interested in the arrival of the thing insured, and the event of the voyage at the time of effecting the policy and at the time of the loss. Nor is it any objection to this insurance that other persons might have insured to the full value. Where a ship and cargo are insured to the full value, and money lent on bottomry or *respondentia*, the lender may insure as well as the owner of the ship and cargo. It has been expressly decided that a creditor may insure the life of his debtor; for though [* 296] he has no right depending upon the life of his * debtor, he might be essentially injured by his death. With respect to the statute of the 19 Geo. II.¹ it was clearly established as law among all the commercial nations of Europe that the insured must have an interest in the thing insured, and could not recover without proving that loss; and herein the marine law differed from the common law of England, which sanctioned an action on a wager without any interest in the parties but what was created by the wager itself. But as this law was introduced in favour of the insurers, and to prevent deceitful and unlawful gaming, the parties, by stipulations inserted expressly for that purpose in the policy, might waive the proof of interest on the

¹ The following observations relative to the 19 Geo. II. were made by Mr. Justice HEATH.

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principle that *quisque potest renunciare juri pro se introducto*, and this was usually done in the manner expressed in the statute; and this principle was recognised in an appeal from Scotland, determined in the House of Lords during the last session. As to the case of *Goddart v. Garrett*, 2 Vern. 269, in which the Court declares the law to be settled that if a man has no interest and insures, the insurance is void, although it be expressed in the policy interest or no interest; it may be observed that this decision was made in the year 1692; and that before the 19 Geo. II. different determinations had been made on the subject of such policies, the history of which is given by Lord HARDWICKE in *The Saddlers' Company v. Badcock*, 2 Atk. 556, in a decree that he made in 1743, which was only three years before the making of the statute. His Lordship says that such insurances began in the Spanish trade, and were called fraudulent insurances as early as when he first sat in the King's Bench. The fraud probably consisted in this, that under the mask of insuring interest or no interest, ships and their cargoes were insured for above their real value, and then fraudulently destroyed. It * has [* 297] been said that to sustain policies of such a nature as the present, would be to depart from the wise and salutary provisions of the statute 19 Geo. II., and to introduce a mischievous species of gaming; but this is a gratuitous assertion. It is impossible to elude that statute. The question always is, Whether the policy be a gaming contract? if it be no artifice, how can it elude the force of the statute? The case of *Le Cras v. Hughes* was infinitely more likely to introduce an abuse of the statute than the present case. That has been decided above twenty years; yet what ill consequences have followed? The same may be said of valued policies. In the case of wagering policies, any number of persons may make insurances on the same ship. But that is not the case here. If the commissioners could not insure this property, the Dutch owners could not; and it would be a strange paradox to assert that these are ships and cargoes subject to all the perils of the sea in their voyage, and yet none are competent to insure them. Though it may be admitted that the commissioners had no *scintilla* of right in possession or reversion; yet they had a contingent interest founded on the statute, the commission and the seizure. It was their duty by all lawful means to provide for the preservation of the property, till they should have an oppor-

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tunity to take possession of it, and insurance was a proper mean for that purpose. The consequence is that the commissioners had a right to insure. With respect to the *Zeelelie*, the above observations put that ship upon the same footing with the rest. But it may further be observed, that at the time when the *Zeelelie* was lost she was detained under the original orders of seizure; for the captors knew nothing of hostilities having commenced. It is contended, however, that the proceedings of the Admiralty will make this ship a prize from the time of the seizure by relation.

It is true that for certain purposes when a sentence of [* 298] condemnation takes * place the property is changed from the time of the capture. But does it follow that the validity of this insurance is to be affected by relation? Before the property in the *Zeelelie* could be changed by any proceeding in the Admiralty she was gone to the bottom; and while she was in existence she was never detained under any other orders than those which were the foundation of the Act of Parliament and commission. The commissioners therefore had such an interest in this ship as enabled them to effect a valid insurance.

THOMPSON, B., agreed in the above opinion with respect to all the ships except the *Zeelelie*; as to which he was of opinion that the commissioners were not interested in that ship at the time of the loss, which did not happen till after the proclamation for reprisals.

CHAMBRE, J., and LAWRENCE, J., answered in the negative.

CHAMBRE, J. — To constitute an interest, such as that which in the declaration is averred to be vested in the plaintiffs as commissioners under the Act, I presume it must be necessary to show that the ships and goods at the time of the sailing, or at least before or at the times of the losses, had become the objects of the plaintiff's commission. If they were not the objects of their commission, I have no conception in what way they could have an interest in them as commissioners. The duties of their office were confined to Dutch property that was actually in the kingdom, and provisionally detained there under the King's authority. No matter who brings it in. They have nothing to do as commissioners with consignments from abroad, nor was any consignment in fact made to them. They have been called statutable consignees. If that phrase means anything, it must mean [* 299] that the statute * had consigned these particular ships to

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the commissioners; but look at the statute, and we find nothing more than that it authorises a commission under which whatever property of a certain description arrives, it will, if they continue commissioners, fall within their care and management officially to prevent its perishing. But the Act had in no respect attached upon this property; it had only created a capacity in the plaintiffs in certain events to receive these or any other Dutch ships or merchandises. The intention of the Crown was that it should come to England: true, but that created no contract with the plaintiffs. It was a general intention applicable to all Dutch ships that were seized or might be seized. The destination of the property was alterable at any time, at the pleasure of His Majesty. The Crown might have given it up to the owners. The property might be changed by the commencement of hostilities. It is no answer to say that a defeasible interest would be sufficient, for there an interest exists till it is defeated. A consignment is a species of mercantile conveyance operating upon the particular effects consigned, which, though it may be defeasible, may operate in the mean time, and enable the consignee by his acts to bind the consignor. The statute creates neither trust nor agency in them before arrival; they are not authorised to give any directions to those who have the ships, &c., in their charge at sea, or to maintain any action in the names of themselves or any others, for any wrong or injury the effects may receive. In short, there is no other foundation for the claim of interest than a mere naked expectation of acquiring a trust or charge respecting the property without a *scintilla* of present right either absolute or contingent, in possession, reversion, or expectancy, in the proper legal sense of the word. If this kind of expectancy which the commissioners had would be sufficient, what was there to hinder the commissioners from insuring every ship belonging *to [*300] the provinces that were out at sea, or in any other situation of insurable risk. The British ships were to seize them if they could. If they succeeded they would endeavour to bring them to England, and when brought there, in the then state of things, they would fall under the management of the commissioners. That would only be adding one more chance to the many that intervened in the present case between the plaintiff's possession and the subject insured, for it is by no means true that nothing intervened but the perils insured against the present case.

LAWRENCE, J. — It is first to be considered what that interest is, the protection of which is the proper object of a policy of assurance. And this is to be collected from considering what is the nature of such contract. The definition of an insurance given by Grotius in the 2nd book of his "Introduction to the Jurisprudence of Holland," part 24, as cited in Loccenius, 175, is, that "*Assecuratio est conventio seu contractus quo quis in se suscipit incertum periculum cui alter est obnoxius qui e contrario eo nomine illi premium retribuere tenetur.*" Pothier, in his "Treatise on Contracts of Chance or Hazard," in his general definition of insurance, states it to be a contract by which one of the contracting parties charges himself with the risk of the fortuitous accidents to which something is exposed, and obliges himself to indemnify the other from the loss which those accidents may occasion in case of their happening, in consideration of a sum of money which the other contracting party gives as the price of the risk with which he is charged (*Traité des Contrats Aleatoires*, sec. 2); and Mr. Justice BLACKSTONE, in his Commentaries (vol. ii. 458), states it to be a contract between A. and B. upon A.'s paying a premium equivalent to the hazard, B. will indemnify or secure him against

a particular event. These definitions by writers of [*301] different countries are in effect * the same, and amount

to this, that insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who, in consequence of such events, may have intercepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things. In the case of the loss of property it is obvious that the owner is prejudiced, and that therefore it is of importance to him, and he is concerned to avert the damage that it may be exposed to; in other cases there may be some difficulty in showing if the event had not happened, that those advantages would have arisen, against the interception

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of which by sea risks the assured means to be indemnified, but that difficulty, when the nature of the contract is considered abstractedly, does not prove that it must be confined to matters of property, where from the variety of probable contingencies (which, independent of the specified risks, may prevent the assured from deriving any benefit from the subject matter insured), it is impossible to weigh the probability of its being intercepted by such risks; an interest so uncertain may not be the subject of insurance. And so Lord C. J. WILLES, in *Fitzgerald v. Pole*, Willes, 648, considered it; where to show that in that case the insurance must be on the ship and not on the voyage, he relied on the impossibility of such contingency as the loss of the voyage being valued; so that according to him the impossibility of valuing, and not the * want of property, was the reason [* 302] why that voyage could not be the subject-matter of this contract. That a man must somehow or other be interested in the preservation of the subject-matter exposed to perils, follows from the nature of this contract, when not used as a mode of wager, but as applicable to the purposes for which it was originally introduced; but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature. According to Scaccia (Quæstio prima, No. 153), "Assecurationis contractus habet locum in quâvis re, seu de quâvis re quæ subjacere possit periculo seu interitui." A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; in quantum mea interfuit, *i. e.*, quantum mihi abest quantumque lucrari potui. Dig. lib. 46 lib. 8, c. 13. And whom it importeth, that its condition as to safety or other quality should continue: interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring: and where a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing, is to be so cir-

cumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest devisable from it may be very different: of the first the price is generally the measure, but by interest in a thing every

benefit and advantage arising out of or depending on such [* 303] thing may be considered as being comprehended. * The

objection to insuring that in which the assured has no property, seems to me to rest not so much on a want of interest as on this, that if the interest intended to be protected by the assurance is liable to be affected by other matters than the perils insured against, of which matters some might happen in the interval between the time of the loss and the probable time when the risk would have ceased had no loss happened, it may be impossible to refer to those perils the prejudice or damage against which the insured meant to protect himself with such degree of certainty as to enable the assured to establish his claim to a compensation on the ground of his loss having clearly arisen from the perils insured against. This objection I conceive might have been made in the case of *Grant v. Parkinson*, though in that case the profits insured were ascertained by contract; for if the army had been marched from Quebec before the ship could have arrived, there would have been no army to supply, by which the profits were to have been made, and in such case, notwithstanding the loss of the molasses by the perils of the sea, the plaintiff's profits would not have been defeated by them; but the event did not happen before the probable time of the ship's arrival, and was by no means likely to happen. And the Court of King's Bench, Lord MANSFIELD being then at the head of it, assisted by some of the ablest men who ever practised in Westminster Hall, held such interest insurable. And it seems that this objection, if valid, would hold to all insurances where there is a possibility of the interest of the parties being defeated by other means than the ordinary perils insured against; *e.g.*, it might be urged against insuring fish or fruit, because they might both perish by becoming putrid or rotten, between the time of the loss and arrival, if a loss had not happened. On these grounds it seems to me that the contract of marine insurance may extend to protect every kind of [* 304] interest that may subsist * in or be dependent upon things exposed to the dangers to which maritime adventures are subjected; and I am not aware that by the laws of this country it

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has been reduced within narrower limits, though several statutes have been enacted to prevent its being made a colour for gaming. The 43 Eliz. c. 12, which erected a Court for determining causes arising on policies of insurance, has, indeed, adverted only "to the usage of the merchants both of this realm and of foreign nations, when they make any great adventure, to give some consideration of money to other persons to have from them assurance made of their goods, merchandises, ships, and things adventured, which course of dealing is commonly called a policy of assurance." But this statute has not limited the contract in this country to such assurances, nor is it to be collected from anything in the statutes that the framers of it supposed the contract of insurance to be of so confined a nature, for the recital speaks of the usage as obtaining among merchants both of this realm and of foreign nations, and that the usage of effecting policies of assurance among foreign nations on other subjects than those enumerated in the 12th of Eliz. will appear from various writers of those nations. And the 13th & 14th Cha. II. c. 23, intituled, "An additional Act concerning matter of assurance used among merchants," in its recital, mentions a want of power in the commissioners to make any order against the ship or goods which commonly are the things assured, evidently implying that other matters might be insured. Conceiving, for these reasons, that the contract of marine assurance is not from its nature confined to protect the interest arising from the ownership of the subject exposed to the risk insured against, I shall proceed to consider whether the defendants in error, as such commissioners, could, under the circumstances of this case, suffer any prejudice or damage by the loss of the ships and goods described in this policy of insurance, so

* as to entitle them to recover, as having an interest within [* 305] the meaning of this policy. From which consideration I would exclude all interest from their title to recompense or profit from their services to be performed, which is the subject of another question. In order to decide this we must look at their commission to see what authority they had, and what duties were imposed upon them, and if it shall appear from it that the purpose and object of their commission was only to take care of the Dutch property after its arrival in England, and if till then they had not any power to interfere with it, they cannot be said at the time of the sailing insurance and loss to have been interested; for until

the time should arrive when their authority and duty as such commissioners would attach, they would have no existing concern in such property, and could not in their character as commissioners suffer any prejudice or damage by a loss happening before they had any concern in the thing assured. Now the commission granted to the defendants in error, in pursuance of 35 Geo. III. c. 80, authorised them to take into their possession and care only such ships and merchandises as His Majesty by virtue of that Act could authorise them to take possession of, so that by the letter of their commission referring to the statute, their care was confined to the ships which had been detained, or might be brought into the ports of this kingdom, and until arrival no property belonging to the subjects of the United States was clothed with those circumstances which designated it to be the object of their commission, and made it the duty of the commissioners to interfere in its preservation. The course of the argument at the bar has not, I think, tended to show that such was their duty; but to establish this proposition, that as the insurance by them was as commissioners, it was not a wager, nor for their benefit as individuals, but a contract of indemnity for the benefit and protection of those who might be [* 306] ultimately * beneficially entitled to the property of the subject-matter insured, if it were brought into this kingdom, and that it is in effect the same thing as if it had been so declared. Probably an insurance with such a declaration would have been good, but of that it will not be necessary to say anything, inasmuch as I conceive (if it was not the duty of the defendants in error, as such commissioners, to insure for the benefit of such persons) that the averment made use of in these pleadings will not bear that construction; whether it will or not must depend on the relation they had as commissioners to the subject insured at the time of the insurance. Had they been authorised generally to take care of ships detained by His Majesty's orders, by the act of detainer the ships would have become objects of their concern, and from thence a duty might possibly have been inferred to take all proper steps to prevent any damage from their loss, and an averment that the defendants in error insured as such commissioners, might have borne the meaning which has been contended for, but that cannot be understood in this case, for the averment in effect refers their interest to the Act of Parliament and their commission, the terms of which

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respect only the case of ships and goods detained and brought into the ports of this kingdom; and I know not how to conceive an interest dependent on a thing, with which thing the persons supposed to be interested have nothing to do. The defendants in error have been considered as trustees or consignees, who, it is said, have insurable interest. But I do not think they can be considered as trustees, or as consignees, having such interest as will support this averment. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured for the benefit of another; but the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered * as consignees in whom any interest or right is [* 307] vested by bill of lading or other instrument of consignment by which the property of the subject-matter of the consignment *primâ facie* will pass. If they be consignees they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees, according to the common understanding of that word; and taking them to be naked consignees who have not the legal property of the subject-matter of the insurance, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made, whether they were certain defined persons or uncertain persons, and not in themselves as commissioners: for taking the meaning of the word "interest" to be what I have stated it to be, it is obvious that a naked consignee who means that the insurance should be applied to the protection of the things insured, and the indemnification of him who suffers by losing the value of those things, his object being not to secure himself from some damage consequential to the loss as his commission, but that others interested as proprietors should be indemnified: it is obvious, I say, that such consignee can himself suffer no prejudice by the total or partial destruction of a thing which forms no part of his property. In the safety of such thing such naked consignee can in this view have no interest. The persons prejudiced by the loss of property are his consignors, or those for whose benefit the property is to be disposed, and in them only in such case and in such light is there an interest. When such consignee insures to protect the interest which property gives, the interest should be averred (*vid. Wolff v. Horncastle*,

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1 Bos. & Pul. 323), either directly, or in terms tantamount, to be in those who are or may be beneficially entitled; for in such case interest means property, and the property must be shown [* 308] to be in him in whom the interest is averred to be. *To the sixth question GRAHAM, B., LE BLANC, J., LAWRENCE, J., ROOKE, J., GROSE, J., THOMPSON, B., HEATH, J., MACDONALD, Ch. B., and Sir JAMES MANSFIELD, Ch. J., answered, First, that the averment touching the right of the commissioners to take possession of the ships and goods upon their arrival in Great Britain was unnecessary, and might be rejected as surplusage; that is, was only introduced to show an interest in the plaintiffs; and as it would have been sufficient to aver an interest without showing how it arose, and as the averment in question was unconnected with the averment of interest, the latter might be proved in any way without regard to the establishment by evidence of the former; they referred to *Peppin v. Solomons*, 5 T. R. 496. Secondly, as to the averment of interest, that whether the plaintiffs were bound to aver an interest or not, yet that having averred that the contract of assurance was made to protect an interest, it was not competent to them to desert that averment, and to recover, as if the contract had a different object. Thirdly, that the statute of the 19 Geo. II. had not rendered any averment necessary which was not necessary before the passing of that Act, the object of which was to prevent gaming, by prohibiting the insertion of certain clauses in the policy, which dispensed with proof of interest; that the statute therefore related only to the proof, and not to the form of pleading; that before the passing of that statute it had been most usual to make an averment of interest, or to state what was equivalent to it, but that there were precedents of considerable authority to show that such an averment was not necessary, which are collected in *Craufurd v. Hunter*, 8 T. R. 13 (4 R. R. 576), and *Nantes v. Thompson*, 2 East, 385 (6 R. R. 458), and from which it appears that such an averment is not essential to maintain a declaration on a policy of insurance; but that, notwithstanding such averment was not necessary to be inserted in the declaration, yet both before and since the statute, [* 309] *indemnity was to be considered as the object of a policy insurance, being a contract to protect the insured from the consequences of certain events which might affect the property insured; and that it was therefore necessary to show that a real fair *bona fide* loss had been sustained.

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CHAMBRE, J. Beyond all question a policy of insurance is a contract of indemnity; and this is an insurance on a real existing interest in the property insured; and therefore it was incumbent on the plaintiffs to state in the first place in their declaration, and afterwards to make out in evidence, a substantial interest. They have declared as for an average loss; and if they can recover at all, it must be only according to the interest they have, according to the loss they have sustained. Their case is that as such commissioners they have sustained a loss; and in proportion to that loss they claim an indemnity. I do not know that any particular sort of averment is necessary in a declaration, but it must be apparent from the facts stated in the declaration itself that there is an interest. It need not be called an interest, but in every case there must appear on the record a *primâ facie* ground of action, and in order that an action brought on a policy of insurance may be supported, it must appear on the face of the declaration that the party some way or other had an interest. Now I take it that one of these averments must be made out; perhaps both need not. If the plaintiffs had alleged simply that they had this interest in this property, that would have done without the averment that if it had arrived in the ports of this country it would have fallen under their care as commissioners under the act. But if the averment of interest is not made out in proof, it cannot be rejected as surplusage: for if you strike it out of the declaration there is no foundation for the action. With regard to the last

* part of the question, whether after passing the 19 Geo. II., [* 310] c. 37, it was necessary in the law in a declaration in an action brought on a policy of insurance effected on a British ship, for the plaintiff in such an action to make any averment touching his interest therein which was not necessary to be made in such declaration previous to the passing that Act of Parliament, the statute certainly introduces no form of averment, it takes away a clause that was frequently inserted in policies of insurance, but it introduces no new form of averment. It was made with an intention to prohibit gaming and wagering policies, and policies containing these words, "Interest or no interest," or "without further proof of interest than the policy." The statute, however, seems to require that there should be some averment. An averment might be made in the manner I have stated. The answer then which I give to this question is, either that some fact should

appear on the face of the declaration to show an interest, or there should be an express averment of interest. Whether this was necessary before the statute seems to be doubtful. According to some precedents it should seem that the averment of interest was considered as unnecessary; but if these precedents may be supposed to be erroneous, I should say that even before the statute there must have been an averment of some kind or other, from which it must appear that such an interest existed.

To the seventh question, GRAHAM, B., LE BLANC, J., LAWRENCE, J., ROOKE, J., GROSE, J., THOMPSON, B., HEATH, J., MACDONALD, Ch. B., and Sir JAMES MANSFIELD, Ch. J., answered, that the want of power to abandon was not a certain criterion of insurable interest; that in many cases there might be insurable interest without power to abandon, as in the case of freight, bottomry, and respondentia; and that the 16 Geo. II., which prohibited [* 311] insurances without benefit of salvage, was not to * be understood as prohibiting the insurance of things not capable of salvage, but only as prohibiting the insertion of a clause to that effect in a policy upon things which were capable of salvage. They all thought that the commissioners might have abandoned these ships and goods, if they had arrived in a British port in such a state as to justify abandonment; and most of them thought that they might have abandoned as agents or consignees of those who should ultimately be entitled, even if the ships did not arrive.

LE BLANC, J., who agreed in the latter opinion, said, Where the subject-matter of insurance is such as not to be capable of being abandoned, there the incapacity to abandon will not affect the validity of the insurance; or, in other words, an incapacity of the person to make an abandonment may, but an incapacity of the thing to be abandoned cannot affect the validity of the insurance.

Sir JAMES MANSFIELD, Ch. J., said, The incapacity to abandon, as I apprehend, will have no other effect than this: that the person who cannot abandon can never recover for a total loss. While anything remains of the things insured, he may take that and make the most of it; he can only recover for a partial loss.

CHAMBRE, J. From the opinion I entertain on the other questions, I cannot give any other answer to this than by saying that in my humble opinion the plaintiffs had not any such interest in the bodies of these ships, or in the goods, or any part of them,

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as was capable of any abandonment. I think they were quite strangers. My answer, therefore, is in the negative, that they had not any such interest as was capable of being abandoned. This policy of insurance is on such a species of property as is in its own nature capable of abandonment, and, to be sure, it is a pretty good test to try the interest of the * party by [* 312] examining whether they were so connected with the property that they could have abandoned it, or whether they could not. I do not mean whether those for whom they acted, for whom they were agents, consignees, or trustees, could abandon; but whether the commissioners could; and I think they could not. I am likewise of opinion that an incapacity on their part to abandon rendered the policy in question invalid.

LAWRENCE, J. The doctrine of abandonment being founded on this ground, *viz.*, that no person shall be paid as for a total loss and retain any interest in the thing insured, by which he may receive more than an indemnity, an incapacity to abandon in cases where the subject-matter is capable of abandonment operates as a medium to show a want of interest in the subject of the insurance, at the time of the loss. And if the commissioners had not a capacity to abandon the subject of the insurance, it will affect the validity of it, as showing they had no interest. And that they had no interest in the subject-matter of the insurance I have endeavored to establish in my answer to the fifth question. But if the averment in the declaration of the interest of the plaintiffs as commissioners can be understood as an averment that the insurance was made for the benefit of those who might be ultimately entitled to the things insured, the incapacity in the plaintiffs to abandon would prevent a recovery for a total loss, where anything had been or might be saved, until they were enabled by those for whom the insurance was made to convey to the underwriters the benefit of such salvage.

To the eighth question; first, the great majority of the learned Judges declared their opinion, that the profits of the commissioners were insurable; they said the commissioners were materially concerned in the safe arrival of * the ships, because [* 313] their profits depended upon it, and they would therefore sustain a loss if the ships did not arrive; that if the commissioners had a moral certainty of deriving the profit, that was an insurable interest; that the commissioners had such a moral cer-

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tainty, it being contrary to the usage of the Crown to remove commissioners when once appointed, except for some misconduct, which was not to be intended; and that they had an existing right to future management. They referred to *Grant v. Parkinson*, Park, M. I. 267; *Le Cras v. Hughes*, Park, M. I. 269, and *Henrickson v. Margetson*, Park, M. I. ed. ult., before Lord MANSFIELD in 1776, where his Lordship held that imaginary profits on a cargo of indigo were insurable; and his opinion was confirmed on a motion for a new trial; to *Craufurd v. Hunter*, 8 T. R. 13 (4 R. R. 576), *Flint v. Le Mesurier*, Park, M. I. 268 n. (a), and *Wolff v. Horncastle*, 1 Bos. & P. 316 (4 R. R. 808, p. 265, *post*), where BULLER, J., held that a creditor who had advanced money which would have been a lien on a cargo if it had arrived, might insure; also to *Barclay v. Cousins*, 2 East, 544 (6 R. R. 505); and they observed that the possibility of the interest being defeated by other events than the perils insured against, such as a countermand by the consignee, was not considered as affecting the right of insurance in those cases; and they put the instance of an insurance of profits upon a perishable cargo, which might become of no value independently of sea risk.

LAWRENCE, J., agreed in the above opinion respecting the right to insure profits; but said that the commissioners in the present case never could have insured if the policy had been effected on their profits, as none of the ships arrived till some time in the year following the declaration of hostilities; and the others, which were lost before the declaration, were lost at a time and [* 314] at a distance * which made it impossible for them to have arrived before such declaration; and that if they could have had no profit as commissioners on the ships' arrival, they could suffer no damage by the loss; for whatever took away the damnification in the whole or in part must operate upon the indemnity in the same degree.

None of the learned Judges denied that the profits were insurable.

Secondly, with respect to the 19 Geo. II., GRAHAM, B., and ROOKE, J., thought that an insurance on profits did not fall within the provisions of that statute.

CHAMBRE, J., LE BLANC, J., MACDONALD, Ch. B., and Sir JAMES MANSFIELD, Ch. J., inclined to think that such an insurance was within the provisions of that statute: they observed that the point

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arose in *Grant v. Parkinson*, but was not determined, the Court being of opinion that the words in dispute, *viz.*, “profits valued at £1000 without other voucher than this policy,” only made it a valued policy, and did not amount to a dispensation from proving interest. They observed that though the subject of insurance was profit, yet that the risk was in fact incurred by ships or goods, upon which the profit was dependent, and the preservation or destruction of which occasioned the profit or loss; and that an insurance upon the profits of any ship or goods, by way of wager, would be a mere evasion of the statute; and though not within the words, must be taken to be within the spirit.

LAWRENCE, J., said, If the question had respected a recompense for services to be performed in regard to the ships of His Majesty or his subjects, or goods laden on board the same, in order to advance the remedy intended to prevent the mischiefs recited in the act, it probably would be held that no insurance can be made on matters *connected with the ships of His [* 315] Majesty, or his subjects, and the merchandises, goods, or effects laden on board them, against any events affecting the same by way of gaming or wagering. But it is not necessary to deliver any opinion on that point; for, as it has been decided that this statute does not extend to foreign ships, it will follow, from such construction of the act, that policies on matters connected with foreign ships are not within it; and that the insurance of the commission of the defendant in error to arise from the care, management, and disposition of the ships in question, and of the goods laden on board the same, they not being the ships of His Majesty or his subjects, is not an insurance within the 19 Geo. II.

The other learned Judges did not deliver any precise opinion on this part of the question.

Thirdly. The learned Judges were unanimously of opinion that the policy in question could not be considered as a policy upon profits, having been expressly declared upon as a policy upon the plaintiffs’ interest in the ships and goods themselves; and that if it had been intended as a policy on profits, it should have been so stated.

After the learned Judges had delivered their opinions, the further consideration of the subject was adjourned to the 10th July, on which day

Lord ELDON spoke to the following effect: Before I state the

first count in the declaration in this case, it will be extremely material to call your Lordships' attention to the counts upon which the jury have found for the defendant. For whatever might have been the opinion of any of your Lordships, if the subject-matter of those counts had been brought before the House

by the bill of exceptions, all further consideration of the [* 316] matters of law and fact arising on those counts is * excluded

by the form of proceedings, unless some means can be found of giving the parties an opportunity to lay the matters stated in those counts again before a jury. The second count states the interest of the property insured to be in His Majesty, and avers that the policy was made on His Majesty's account, and that the commissioners had given directions to the agents to negotiate policies on his account. But as the jury have found for the defendant on this count, it is not open to us to say that His Majesty had any interest in the property, or that the commissioners insured on his account, except so far as those circumstances arise out of the first count. The third count avers that the property, at the time of the insurance and loss, belonged to foreigners. The object of this count was to dispense with the averment of interest; for if the property belonged to foreigners, the insured might recover, although he had not an interest. But the jury having also found for the defendant on this count, it cannot now be said that these were ships on which an averment of interest is unnecessary. Upon all the common counts the jury have also found for the defendant. The question, therefore, upon this bill of exceptions is reduced to this, Whether the plaintiffs have supported their demand upon the first count, and to the extent to which they have recovered, as to each and every of the ships mentioned in the declaration? (His Lordship then stated the first count.) The effect of the averment of interest in this count, as it seems to me, is, that the commissioners had a right and an interest, as such commissioners, to make an insurance for their use, benefit and account, as such commissioners, at the time when the ships were at St. Helena, when they sailed from thence, and till the time of the losses. And the averment is not only predicated of all the ships, but of each of them at each of the times mentioned in this part of the declaration. It is averred that the

ships sailed from St. Helena upon the 2d of July, 1795, [* 317] for London; that * the *Houghley*, with part of her cargo,

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was lost by perils of the sea on the 1st of September, 1795; and the *Surcheance* and her cargo on the 5th of September; that the *Dordrecht* was disabled on the 13th, but was carried into Ireland and sold there, and her cargo brought to London; and that the *Zeelelie* was lost on the 29th of September, which was after the declaration of hostilities between this country and the United Provinces, which took place on the 15th of September, and which stamped the character of enemies' property upon the *Zeelelie* from the date of that declaration. As I understand the case, the verdict has been taken for damages, computed upon the principle that the commissioners had a right to recover in respect of all these ships and their cargoes, and not merely upon some of them. If, therefore, it should turn out that they have only a right to recover upon some, and that it should appear upon the record that they have recovered upon all, there will be a miscarriage in the course of justice. [His Lordship then stated the bill of exceptions.] The questions now are, First, Whether upon the matters disclosed on the first count the commissioners had an insurable interest in any of the ships and cargoes upon which they have recovered? Secondly, If they had an insurable interest in any, whether there are not some on which they had no such right? Whether your Lordships shall come to the conclusion that they have no right to recover upon any of these ships and cargoes, or to a more limited conclusion, and take such steps as may be in your power to collect the true result of the proceedings which have been had, it seems to me due to the importance of the subject to enter into some of the topics which have been discussed at the bar; and to determine the real character of the plaintiffs which led to the existence of their commission. The orders of Council, referred to in the bill of exceptions, applied to a state of this country with relation to the United Provinces and their inhabitants, * which [* 318] I may represent as perfectly unparalleled. The United Provinces had been reduced under the yoke of France, then at open war with this country; whether finally reduced or not was the question. The former Government and a great part of its subjects were adverse to France, and attached to this country; many of the inhabitants had proposed to resort to this country for protection, and some had come here with their property. It was thought a humane policy not only to protect the individuals, but to bring into the ports of this country Dutch property bound to

Holland, for the benefit of those who might ultimately turn out to be entitled. On the other hand, in case a war should take place, the property of the United Provinces and of its inhabitants would become the property of the crown, and subject to be disposed of by His Majesty. Yet even in that event it appears to me to have been taken for granted that many Dutchmen might acquire a friendly character, and be entitled to be considered as owners of the property taken, and to whom, therefore, it would have become liable to have been restored. It was impossible, however, to make a provision of this sort in the exercise of His Majesty's prerogative, since such ships and cargoes could not enter British ports consistently with law. The power of the Legislature, therefore, was called in; but it may be observed, that so far as related to detaining Dutch ships and cargoes at sea, by the force of the state the prerogative of the Crown was fully sufficient, and the Act appears to have been studiously framed to avoid any interference with that prerogative. Accordingly, the power of the commissioners is expressly limited to ships and goods that have actually come, or been brought into the ports of Great Britain. All the directions relative to bringing these ships into port were given in the legitimate exercise of the King's prerogative for the protection of the State and its allies; and it appears to [* 319] me, as it has done to the * learned Judges unanimously, that there is nothing in this Act of Parliament which touches the prerogative while the ships and cargoes were at sea, or even in the ports of Ireland; and that it was competent to the Crown from the moment they were taken possession of to restore them to the Dutch owners or the Dutch government, or to deal with them in any manner which should be thought fit; for the power of the commissioners never attached till they actually came into a British port. If this be the law, it is a direct negative of that which the averment seems in a general sense to import, and those averments can only be true in this sense, that the commissioners had a power to dispose of the ships and cargoes if they happened to come into port, and His Majesty's orders did not intervene to prevent their being brought in, or hostilities did not intervene to prevent their being brought in, or to change the characters of the owners. For it appears to me, that even though the ships and cargoes were taken possession of by the commissioners, the Act was not intended to operate upon them if hostilities should

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take place. With respect to those brought in after hostilities, they would be ships in the hands of the King's officers, to be condemned as seized by the force of the State, and distributed according to His Majesty's bounty. It could not be the intention of the Act to affect the rights of the Crown. It has indeed been stated by one of the learned Judges, that these commissioners might have sold the ships. With great deference to the authority of that learned Judge, I must state to your Lordships my humble but confident opinion, that they could not have sold them; and I go much further; the commissioners could not have made a good title, even if they had been brought into an English port. Among the subjects of this country, indeed, who are bound by an English Act of Parliament, they might have made a good title. But if a ship be taken by hostile force, the title to that ship as against *foreigners cannot be changed by any act of local [* 320] legislature, but the ship must be condemned in a Court proceeding according to the law of nations on rules binding not only on the subjects of the country where the Court is held, but on foreigners who are not so. So far, therefore, from these commissioners having a power to sell the ships *in transitu*, they could never make a good title against the Dutchmen at sea, unless the person having possession could show the condemnation of a prize court. These principles are strongly illustrated by the evidence. The moment hostilities took place the property was condemned as prize. The power of the commissioners could never have attached upon it in the hands of the King, nor could they have any authority to deal with it, unless the King had thought proper to grant it to them. With respect to the ships in the ports of Ireland, he expressly constitutes them prize agents; and with respect to those brought into this country and condemned, he authorizes them to deal with the proceeds in the manner they had been instructed to deal as commissioners, and according to such instructions as they should thereafter receive. But I state it with great confidence, though I hope with proper humility, as my clear opinion, that after the declaration of hostilities the commissioners neither did deal, nor had a right to deal with the property as commissioners. His Majesty having a title to it makes them his agents, and points out to them in what manner they shall exercise that agency; directing that it should be in the same manner as if they had derived their title under the commission, and not under their

special appointment as prize agents. This is not a case in which there is any averment of an interest in these commissioners beneficial to themselves, and the question is, Whether the power, or faculty, or right of concern and management which these commissioners might or might not have had, which they would [* 321] have had if these ships had come *into port, and which they might have ceased to have the moment after, be the subject of a legal insurance? Since the 19 Geo. II., it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. In the 19 Geo. II., as well as in every other statute and charter relating to insurance, the objects of insurance are plainly described to be ships, cargoes, wares, merchandises, or effects. One or two later statutes mention property; but as to expectation of profits and some other species of interest which have been insured in later times, there is nothing to show that they were considered as insurable. I do not wish that certain decisions which have taken place since the 19 Geo. II. should be now disturbed, but considering the caution with which the Legislature has provided against gambling by insurances upon fanciful property, one should not wish to see the doctrines of those cases carried further, unless they can be shown to be bottomed in principles less exceptionable than they would be found to be upon closer investigation. Lord KENYON, in *Craufurd v. Hunter*, considered the 19 Geo. II. as a legislative declaration that an insurance might have been effected before that statute without interest. It is with great deference that I entertain doubts on that subject. Lord Chief Baron COMYNS, in the case of *Depaba v. Ludlow*, Com. 360, speaking of [* 322] this *statute, says that it was an act to affect the form of the policy: and Lord HARDWICKE has said the same in two cases, *The Saddlers' Company v. Badcock*, 2 Atk. 554, and

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Pringle v. Hartley, 3 Atk. 195, in the latter of which he distinctly says that the words "interest or no interest" were meant only to dispense with the proof of interest on the trial. If, then, a policy with the words "interest or no interest" were stated in a declaration, and those words meant that there should be a dispensation with the proof of interest, there would be something like an averment on the one part and an admission on the other that there was an interest. I cannot conceive how such decrees could have been made in Courts of Equity as were made there previous to the 19 Geo. II., if an insurance could have been made without interest, for no Court of Equity could relieve against the effect of a contract valid in law. But if the words "interest or no interest" amounted to an agreement to dispense with the proof of interest, the principles upon which those decrees proceeded may easily be accounted for. If the insurer, having admitted an interest which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a Court of Equity that he had been taken by surprise in his admission, and the policy would be ordered to be delivered up. There is some strange language to be found in our books respecting wagering and valued policies, the latter of which, though frequently in effect wagering policies, have been permitted, because it has been supposed that the convenience of them is greater than would result from the prohibition of them. But the language of all Courts of justice has been extremely careful, lest the permission of valued policies should introduce a species of gambling policies. With respect to foreign ships, the averment of interest has been dispensed with, not because insurance on them could be made without interest, but on account of the difficulty of proof. But whatever *may have been the common law, the 19 Geo. II. has [*323] prescribed what should be the law thereafter, and all Courts of justice are bound to follow up the spirit of that Act. If this power and faculty of future concern be an insurable interest, we ought at least to take care not to extend to such interest a protection that would be denied to policies of a more solid nature, lest that sort of wagering in policies should grow up which has of late been extending itself considerably. It has been said that the commissioners either are or are not like trustees, consignees, or agents, and that they had as good an insurable interest as the captors in the *Omoa* case, or a creditor on the life of his

debtor. If the *Omoa* case was decided upon the expectation of a grant from the Crown, I never can give my assent to such a doctrine. That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favour of the expectation. That which was wholly in the Crown, and which it was in the power of His Majesty to give or withhold, could not belong to the captors, so as to create any right in them. I am far from saying, however, that that case might not have been put upon other ground. The captors not only had the possession, but a possession coupled with the liability to pay costs and charges if they had taken possession improperly. There was also a liability to render back property which should turn out to be neutral, and a liability as agents to act for the King as their principal; and I should be disposed to say that the King had an insurable interest as the person who had the *jus possessionis*. His right, indeed, was liable to be affected by a sentence of the Court of Admiralty. But as the insured is often entitled to consider the property as gone the moment the capture takes place, so I think that the King may be considered as against all the world as having an interest in the property before condemnation for the purpose of [* 324] insuring. * With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So a consignee has the power of selling, and the same may be said of an agent. I cannot agree to the doctrine said to be established in the Courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract, nor can I advise your Lordships to proceed without much more discussion upon authority of that kind. There are different sorts of consignees: some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal. But in the present case the commissioners do not insure in respect of any benefit to themselves, nor of any benefit to the Crown, or to any other person or persons stated on this record; they insure merely as commissioners, and if they have a right so to insure, it seems to me that any person who is directed to take goods into his warehouse may insure; and that there is nothing to prevent

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the West India Dock Company from insuring all the ships and goods which come to their docks. If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure. First the dock company, then the dock-master, then the warehouse-keeper, then the porter, then every other person who to a moral certainty would have anything to do with the property, and of course get something by it. Suppose A. to be possessed of a ship limited to B. in case A. dies without issue; that A. has twenty children, the eldest of whom is twenty years of age; and B. 90 years of age; it is a moral certainty that B. will never come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir-at-law of a man who has an estate worth £20,000 a year, who * is ninety years of age; upon his death-bed intestate, [*325] and incapable from incurable lunacy of making a will, there is no man who will deny that such an heir-at-law has a moral certainty of succeeding to the estate; yet the law will not allow that he has any interest, or anything more than a mere expectation. I am the more surprised at the doctrine which has been advanced upon this subject, recollecting the case of a gentleman who had been in a state of incurable lunacy for many years, in the time of Lord BATHURST, who was then assisted by no less a man than Lord Chief Justice DE GREY. Certain individuals filed a bill to perpetuate the testimony of their being heirs at law, and next of kin. Lord THURLOW, then attorney-general, demurred to that bill, and the ground of his demurrer was, that though it was as morally certain as anything could be, that those individuals would succeed to the property; yet as the whole of it was in the lunatic, no part of it could be in anybody else, and therefore their moral certainty raised no title in a Court of justice. One of the persons to whom I am alluding concluded with these words: "Courts of justice sit here to decide upon rights and interests in property; rights in property, or interests derived out of contracts about property. They do not sit here to decide upon things in speculation. Speculative profits are nothing." I send my ship to India; I expect profit from the voyage; if the ship is lost, my expectation is defeated; but of those expected profits the law can have no consideration; and I am sure that Lord Ch. J. WILLES did not hold that such expectations might be regarded in the case of *Pole v. Fitzgerald*, Willes, 641; the doctrines of which case

have been wounded to the quick by the representations made of them in subsequent cases; and among the rest in the first volume of Burrow; which representations are most inaccurate, if they are meant to convey, as the result of that case, that where [* 326] there is a *contract under which a party is to receive profit, and such profit so secured by contract may be affected by some contingency connected with the voyage, it is insurable. I do not assert that it is not insurable; but I cannot accede to that which has been stated as part of the doctrine upon this subject — that unascertained profits, which may or may not be made, may be insured. The present case, however, assumes not only that a man may insure unascertained profits from his own losses, but that he may insure profits to arise out of ships and goods, which he has not, and which he never may have in his possession, and from the management of which he never can obtain any profit. If I were bound now to state my opinion judicially upon this first count, I should be obliged very strongly to say, that the claims of the plaintiffs could not be supported; but I do not think it will be necessary for me to say that I am sure that it cannot be supported to the extent to which damages have been found, for the *Zeelelie* having been lost after the declaration of hostilities, unless I mistake the act and commission altogether, she was not a ship which the plaintiffs could have taken into their possession as commissioners; they have therefore sustained no loss as commissioners with respect to that ship; and it will be essentially necessary that a distinction should be made in the proceedings in the Court below with respect to the different ships, in order that the damages may be properly computed. It appears to me that the proper mode of proceeding will be that we do award a *venire de novo* for this purpose. The whole record will then be carried down, and the case will be open, and all the different interests which are averred in the other counts. As the matter now stands, I think it impossible to affirm this judgment. With respect to the conduct of the underwriters I have said nothing. Courts of justice have no right to tell men whether they are acting honestly or dishonestly. It is the duty of a Court [* 327] to say whether they have acted legally. * To that consideration I have entirely confined myself.

LORD ELLENBOROUGH, Chief Justice of the King's Bench.

From a due regard to your Lordships' time, and a recollection

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of the very urgent business which presses, I shall occupy but a very short portion of time, more especially as I entirely coincide with my noble and learned friend who has just spoken not only in his general views of the case, and the principles which he has stated, but in every part of that discussion, and the application of every part of what he has said to this record; I will therefore only state my opinion very shortly, that the direction of the noble Lord, to which exception has been taken, cannot (independent of the general doctrines of law, upon which you have heard different opinions from the learned Judges) be sustained in its terms. The direction was, that if the jury believed the whole of the evidence, they might find a verdict for the defendant in error upon the issue joined on the first count. That count states the periods of time at which the several losses happened, and it predicates the loss of the *Zeelelie* on the 20th of September, 1795. That loss, therefore, is posterior to the declaration of hostilities, which is upon the same record stated to be upon the 15th of September. The periods of the several losses are not laid, as is usually the case, under a *videlicet*; and it is stated that the plaintiffs below proved that the ships and cargoes were, at the times and in the manner in the first count mentioned, damaged, lost, and destroyed, whereby an average or partial loss of 40 per cent. was sustained. Now the average loss given by the verdict is combined, the aggregate, consisting of those ships which were lost before the declaration of hostilities, and one, namely, the *Zeelelie*, which was lost after, and which, therefore, could not be lost at that time to the * commissioners, who had no antecedent power of taking [* 328] possession; the property in that ship having, by the declaration of hostilities, become vested in the Crown *jure belli*; the loss, therefore, could not have been the loss of the commissioners, but of the Crown. The damages, therefore, being composed of an aggregate, of which one ingredient cannot by law be admitted, the finding is erroneous. With all deference to the noble Judge, the direction should have been, that as to so much of the count as charged the loss to have been sustained by the commissioners, except as to what related to the *Zeelelie*, they might find their verdict, but as he has not drawn the distinction, and the *Zeelelie* is made to form a constituent portion of the loss, the direction is upon clear principles a mistaken direction. There ought, therefore, to be an opportunity given for the rights of the

parties to be properly adjudged, and for that purpose I should recommend to your Lordship to grant a *venire facias de novo*. Upon that *venire*, which it is competent to this House to grant, there may be a verdict found: if the evidence shall sustain it upon the count which avers the interest to be in the King. And if the party can make out his case upon that count in point of evidence, that count appears to me much more competent to sustain the case in point of law. It does not become me to anticipate the decision upon the question whether the case can be sustained or not, but by granting a new trial your Lordships would enable the parties to litigate their best title, instead of being restrained to that which is a futile one. I have a further opinion, which it is unnecessary to discuss. The direction of the noble Lord being certainly erroneous in the particular which I have stated, it appears to me that there ought to be *venire facias de novo*.

LORD CHANCELLOR (LORD ERSKINE). I will not detain your Lordships further than to state my entire concurrence [* 329] * in the opinions delivered by my noble and learned friend, and the reasons given by my noble friend who first addressed you. I feel so much reverence for the opinion of the learned Judges that I should have been greatly embarrassed in presuming to differ from them, if this subject had not been one in which I have in a manner spent my whole life, and if I had not lived in that particular Court in which questions of this sort are in daily occurrence. But I feel myself obliged to state (without anticipating at all what may be the event of a new trial) my clear opinion, that if the verdict be suffered to stand, as it now does, upon the first count, and, above all, if it be affirmed by your Lordships' judgment upon the principles on which it has been argued at your bar, and received the sanction of the learned Judges, it would introduce infinite confusion into the administration of justice, and enable persons to insure property who have no manner of right. Independent of the objections that have been taken, supposing the commissioners to have had a right at all events to take possession of these ships on their arrival in England, they could have had no such right after the commencement of hostilities, and after the rights of the captors and the Crown had intervened. I am, therefore, most clearly of opinion that a *venire facias de novo* should be granted.

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The LORD CHANCELLOR then moved that a *venire facias de novo* should be awarded; which was ordered accordingly.

The *venire de novo* having issued, the cause was again tried before Lord ELLENBOROUGH, Ch. J., at the Guildhall sittings after Michaelmas Term, 1806, when a verdict was found for the plaintiffs upon the second count of the declaration, which averred the interest to be in the King. Judgment was pronounced by the King's Bench accordingly.

* At the trial a bill of exceptions had been tendered to [* 330] his Lordship, which was subsequently made part of the record and removed therewith by writ of error to the House of Lords.

(IN THE HOUSE OF LORDS.)

Lucena v. Craufurd and others (second trial) in Error.

1 Taunt. 325-340.

The bill of exceptions on the second trial in [1 Taunt. 328] substance stated that the plaintiffs, to maintain the issue, joined upon the second count of the declaration, gave in evidence a certain commission by letters patent under the great seal, granted by the King in council, in pursuance of the said Act, to the plaintiffs, bearing date the 13th of June, 1795, by which, after reciting as well the preambles as the enactments of the stat. 35 Geo. III. c. 80, ss. 21 and 38, His Majesty constituted the plaintiffs commissioners for the purposes mentioned

* in the Act, and did authorise and require them to take [* 329] all such ships and cargoes, &c., into their possession and under their care, as His Majesty could or might, by virtue of the said Act, authorise them to take into their possession and under their care, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should from time to time receive from the King in council, and otherwise, in all respects, according to the said recited Act, and also to give such directions respecting the proceeds of the sales of any cargoes mentioned in the said Act to have been ordered to be sold, as the commissioners were therein and thereby required and authorised to give respecting the same, thereby also giving and granting to the plaintiffs all and singular such powers and authorities, and authorising and empowering them to execute all such duties, Acts, matters, and things as His Majesty could or might give or grant.

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or authorise or require to be executed by the commissioners to be appointed by him under that Act. The plaintiffs further proved that the Lords of the Admiralty had, on the 16th of February, 1795, transmitted to the commanding officers of His Majesty's fleet certain additional instructions, under his sign manual, bearing date the 9th of February, and requiring the commanders of His Majesty's ships of war, and privateers that had or might have letters of marque against France, to bring into the ports of this kingdom all Dutch vessels bound to or from any ports in Holland, in order that they, together with their cargoes, being Dutch property, might be detained provisionally. They also proved that before the making of the policy, on the 10th of June, 1795, there being at that time no declaration of war between His Majesty and the United Provinces, the *Houghley*, *Alblasserdam*, *Dordrecht*, *Zeelelie*, *Meermin*, *Agatha*, *Mentor*, and *Surcheance*, with cargoes of goods on board, being ships and goods belonging to subjects and inhabitants of the United

Provinces, coming from certain parts of Asia and Africa, [* 330] * and bound to certain ports of the United Provinces, were

by virtue of the instructions and the order of the Lords of the Admiralty, seized and taken at sea, on their voyage from Asia and Africa to the United Provinces, by Captain Essington, commander of the *Sceptre*, in company with some ships in the East India Company's service, in order and to the intent that such ships and goods might be brought into the ports of this kingdom; and such ships, with such goods on board, had been carried into St. Helena for the purpose of being brought from thence to some port or ports of this kingdom. The plaintiffs also proved that the defendant subscribed the policy on the 22d of August, 1795, and that notice of the losses and misfortunes which befell the said ships and goods arrived in this kingdom before any declaration or valuation was or could be made of the said ships and goods; that the plaintiffs were the persons who gave the order for the policy; and that on the 2d of July the ships were in safety, with the goods on board, at St. Helena, and were about to proceed on the voyage averred, and were intended to be brought from St. Helena to London, and on that day sailed from St. Helena with convoy for England, upon the said voyage, and that before their arrival at London the *Houghley*, *Surcheance*, *Dordrecht*, and *Zeelelie*, with their cargoes, were, at the times and in the manner in the second

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count mentioned, damaged, lost, and destroyed; and that an average or partial loss of £40 per cent. was sustained upon all the ships and goods insured, and that the *Alblasserdam*, *Meermin*, *Agatha*, and *Mentor*, with the goods on board thereof, arrived in this kingdom in the course of the year 1796. The plaintiffs also produced a letter from Mr. Rose, the then secretary to the Lords of the Treasury, addressed to the plaintiffs as such commissioners, dated the 22d of August, 1795, and communicating, by the commands of the Lords of the Treasury, their opinion that the Dutch East Indiamen captured near St. Helena, and then on
* their passage to this country, should be insured from sea [* 331] risk and enemy, and desiring that the plaintiffs would take the necessary steps for insuring them accordingly. Mr. Rose also proved that it is a usual practice at the treasury to give directions by parol in the first instance, and afterwards to send a written authority, and also that the Lords of the Treasury had, on the 11th of August preceding, refused their authority for insuring the said ships and goods, and directed the letter of that date, hereinafter set forth, to be written and sent to the plaintiffs, but afterwards approved of the insurance having been effected.

The material parts of the evidence on the part of the defendant consisted of a letter from Mr. Rose, dated the 11th of August, 1795, informing the commissioners for the sale of Dutch property that, in reply to their application, he was commanded by the Lords of the Treasury to acquaint them that their Lordships were of opinion, it would not be necessary to insure the Dutch East India ships or their cargoes from St. Helena; the order of His Majesty in council dated the 16th of January, 1795, by which it was ordered that all goods and effects coming directly from any of the ports of the United Provinces, to any of the ports of this kingdom, in the vessels of any country, and navigated in any manner, should be permitted, until further order, to be landed and to be secured in warehouses under the joint locks of His Majesty and of the proprietors, at the risk and expense of the proprietors, there to remain in safe custody for the benefit of the proprietors, until due provision should be made by law to enable such proprietor to re-export or otherwise dispose of the same; and the order in council of the 21st of January, 1795, which directed that all goods and effects whatsoever, belonging to any of the subjects or inhabitants of the United Provinces, or belonging to any

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[* 332] subject of His Majesty, or to any subject * of any country in amity with His Majesty, coming from any part of Europe, Asia, Africa, or America, in amity with His Majesty, in vessels belonging to any subject or inhabitant of the United Provinces, or to any subject of His Majesty, or of any country in amity with His Majesty, and bound to any port of the United Provinces, might, until further order, be permitted to be landed in any port of this kingdom, and might be secured in warehouses for the benefit of the proprietors, in the same manner as was directed in the above-mentioned order. The defendant also gave in evidence certain instructions given by the King in council to the plaintiffs, on the 13th of June, in the same year, by which, after reciting that, by virtue of the powers vested in His Majesty by the Act 35 Geo. III., c. 80, His Majesty had issued the commission before mentioned, the commissioners were directed forthwith to take into their possession, and under their care, all such ships, goods, and effects, according to such lists thereof, as they should from time to time receive from the commissioners of the customs in England and Scotland respectively, in pursuance of directions which they would receive from the Lords of the Treasury, for the purposes above mentioned. And the plaintiffs were required to be careful to execute the directions given them in the several clauses of the Act, and in all cases of doubt or difficulty they were to apply to the Privy Council for further instructions. The defendant also gave in evidence the King's proclamation of the 15th of September, 1795, containing an order for general reprisals against the ships, goods, and subjects of the United Provinces, and an order made on the 26th of November, by the Lords of the Privy Council, by which, after reciting that four Dutch East Indiamen, the *Alblasserdam*, the *Vrouw Agatha*, the *Mentor*, and the *Dordrecht*, then lying in the Shannon, in Ireland, had been sent in thither by the *Sceptre*, commanded by William [* 333] Essington, Esq., or by other ships * under his command, antecedent to the order in council for granting general reprisals, and that agents had been appointed by Captain Essington, and others concerned in sending in the said vessels: and that the sole interest in all ships so sent in was vested in His Majesty, and the appointment of agents for the care and disposal thereof did of right belong to His Majesty, it was ordered in council that the plaintiffs should be the agents on behalf of His Majesty, for the

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care and management of the said four Dutch ships and their cargoes. The defendant further proved that the plaintiffs, by virtue of that order of council, took possession of the *Alblasserdam*, *Mentor*, *Agatha*, and *Dordrecht*, in Ireland. The plaintiffs then produced in evidence certain instructions given by His Majesty to His High Court of Admiralty, on the 10th day of October, 1795, whereby, after reciting the powers conferred on His Majesty by the stat. 35 Geo. III. c. 80, and the commission which had issued thereupon, and that the commissioners so appointed had taken possession of many ships and goods belonging to the subjects and inhabitants of the United Provinces: and that since the issuing of the commission His Majesty had ordered general reprisals to be granted against the ships, goods, and subjects of the United Provinces, and had issued a commission authorizing the Lords of the Admiralty to require the High Court of Admiralty of Great Britain to take cognizance of, and judicially proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that were or should be taken, and to hear and determine the same, and, according to the course of the Admiralty and the law of nations, to adjudge and condemn all such ships and goods as should belong to the United Provinces, or their vassals or subjects, or to any other inhabiting within any of their countries, territories, or dominions, His Majesty directed that the Court of Admiralty should proceed to the adjudication of such ships and goods of * which possession had been taken or [* 334] should be taken by the said commissioners, as should be proceeded against by His Majesty's advocate-general on his behalf, in order that the same, being the property of the United Provinces, or their subjects, might be condemned to His Majesty as good and lawful prize, reserving, nevertheless, to the said commissioners, the care, sale, and management thereof, as well before as after final adjudication, according to the provisions of the said Act. The plaintiffs also gave in evidence the proceedings and sentences of the High Court of Admiralty, by which the *Houghley*, *Zeelelie*, *Surcheance*, *Dordrecht*, *Alblasserdam*, *Meermin*, *Vrow Agatha*, and *Mentor*, and their respective cargoes were pronounced to have been taken before the declaration of hostilities against the Dutch, and to have then belonged to subjects of the States General of the United Provinces, now enemies of the Crown of Great Britain, and as such, or otherwise, subject and liable to confiscation, and

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the same were thereby condemned as good and lawful prize to His Majesty.

The bill of exceptions further stated that the counsel for the defendant insisted that, upon the evidence, the plaintiffs could not, in point of law, maintain the issue on the second count of the declaration; first, because the evidence did not prove that His Majesty was, at the time when the ships and goods sailed from St. Helena, nor when the insurance was effected, nor from thence until and at the time of the loss of the *Houghley* and *Surcheance*, interested in the ships and goods insured, or any or either of them, to any amount or in any manner whatsoever, so that a legal and valid insurance could be effected thereon on account of His Majesty by the plaintiffs. And, 2dly, because it did not appear, nor could be legally inferred from anything which had been given in evidence, that the plaintiffs were legally authorised to effect the insurance on account of His Majesty, [* 335] * or that the insurance effected by the plaintiffs had been legally adopted by or on behalf of His Majesty. But that the CHIEF JUSTICE directed the jury, that upon the evidence the plaintiffs might maintain the issue as to the second count, and that His Majesty, at the times when the ships and goods sailed from St. Helena, and when the policy was effected, and from thence until and at the time of the loss of the *Houghley* and *Surcheance*, had an insurable interest in the said ships and goods; and further, that, if any of His Majesty's subjects effect an insurance for the benefit and account of His Majesty, His Majesty may legally adopt and ratify the same, and that the insurance in the second count mentioned was adopted and ratified by His Majesty, and the jury gave their verdict for the plaintiffs as to the second count, with £800 damages, and for the defendant as to all the other counts.

RALPH CARR, for the plaintiff in error.

J. A. PARK, for the defendant in error.

The plaintiff in error assigned errors generally upon the insufficiency of the declaration, the misdirection of the CHIEF JUSTICE, the verdict on the second count, and the judgment, and stated in support of his assignment the following reasons:—

1. Because a policy of assurance is a contract of indemnity, and therefore requires that the person on whose account it is effected

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should be interested at the time in the property insured; and because His Majesty, neither at the time when the risk commenced, nor when the policy was effected, nor at the period of the loss of the *Houghley* and *Surcheance*, had any interest in the ship and goods insured, whereon a valid insurance could be effected.

2. Because the ship and goods insured were, at the time when the risk commenced, when the policy was effected, and at time of the loss of the *Houghley* and *Surcheance*, the property of certain citizens of the United * Provinces, between [* 336] which country and Great Britain there then existed peace.

3. Because this insurance was effected by the defendants in error, as commissioners, and as in their own right, under a supposed interest, inherent in that character, and not on account of or in behalf of His Majesty.

4. Because the defendants in error, at the time when the insurance was effected, had not any authority to effect any insurance on account of His Majesty.

5. Because an insurance, which is illegal and void at the time when it is effected, cannot be made valid by matter subsequent to the contract.

6. Because this insurance was not legally adopted or ratified by His Majesty.

S. SHEPHERD.

RALPH CARR.

The defendants in error prayed that the judgment might be affirmed, for the following, amongst other reasons:—

1. Because the United Provinces, to the inhabitants whereof the ships and goods in question, until the seizure thereof by His Majesty, belonged, were, at the time of such seizure, under the power and control of France, then being in open hostility against His Majesty: that under these circumstances, His Majesty, by virtue of his undoubted prerogative, had caused the said ships and goods to be seized, in order that the same might be brought into this kingdom, and there detained provisionally; whereby His Majesty had acquired the lawful possession thereof, and an inchoate right of property in the same; and that the said ships and goods were afterwards regularly condemned to His Majesty as good and

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lawful prize, by the High Court of Admiralty, being a Court in that behalf of competent and conclusive jurisdiction.

2. That it is a principle of law, that every ratification of any act done for a man's benefit, relates back to the [* 337] * time of doing it, and has the effect of a previous order.

That if this principle applies, as it does, to the case of common persons, it applies more strongly to acts done for the benefit of His Majesty by any of his subjects, and afterwards adopted and ratified by His Majesty; for every subject is bound to do all acts in his power for the benefit of His Majesty. And still more strongly does it apply to the present case, where the commissioners, who caused the insurance in question to be effected for His Majesty's benefit, were so far from being strangers to the subject-matter of the insurance, that they were the persons expressly authorised by His Majesty's commission, grounded on the Act of Parliament therein referred to, to take the ships and goods insured under their care upon the arrival thereof in this kingdom, and to manage, sell, and dispose of the same, as might be expedient for the benefit of His Majesty.

V. GIBBS.

J. A. PARK.

JOHN RICHARDSON.

Shepherd, Serjt., for the plaintiffs in error, reduced his objections to three; 1. That His Majesty had no interest in the ships. 2. That the insurance was not made on behalf of His Majesty. 3. That the insurance had not been ratified on behalf of His Majesty.

1. The allegation of interest is essential. To constitute an insurable interest, it is at least necessary that there should be a right existing, and vested, at the time of the insurance. If not, any speculation or expectation of profit is an insurable interest. In the one case the right exists, though not the benefit; in the other case, the right is to commence *in futuro*, as well as the benefit. Supposing that profits are insurable, yet in the case of *Grant v. Parkinson*, Park, 354, 6th ed., the assured had an existing right to all the profits the cargo might produce. [* 338] * But His Majesty had no right to these ships at the time of this insurance. Whether capture gives the Crown an inchoate right, to be confirmed by the sentence of condemnation,

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or, more properly, an absolute right, subject to be defeated by a future adjudication; at all events, after capture, the right is *in esse*. But the act of seizing these ships was no capture, nor was it in any respect a hostile act, nor distinguishable from an embargo in any of its consequences, or in any circumstance, except that it was a detention of the ships at sea instead of in port; which is the more usual case of an embargo. The Act did not transfer the property to His Majesty, although it might, like any other embargo, be a very proper exercise of the prerogative; for an embargo does not change the property in the ships of amicable powers lying in our ports, either of itself, or in the event of war being declared before the embargo is taken off. The right to the ships, which in that case are thenceforth detained as prize, accrues only from the time, and by the commencement of hostilities. The only difference made in the statute between the regulations of ships and cargoes brought in hither by Dutch subjects, and those brought in by His Majesty's officers, was merely founded upon this: that in the one case, the proprietor, being present, was directed to manage his own property: in the other, the owners being absent, agents were appointed to manage the goods for them. Until the declaration of hostilities the King had merely a prospect or speculation of future interest; if he had an insurable interest before that event, it follows that whenever goods are detained here under an embargo, the possibility that before the embargo is taken off war may be declared against the power to which they belong, gives the King an insurable interest in them. He might equally be said to have an interest in an enemy's ships at sea, or blockaded in port: for he might expect to capture them, and might therefore* insure them [* 339] against being destroyed by the enemy. Such a case renders apparent the absurdity of the proposition that insurable interest does not depend on existing rights, but may be founded upon rights to be acquired after the insurance. The sentences of condemnation afford no answer to this objection: they only prove that the persons to whom the goods belonged were enemies at the time of the condemnation, but they do not show that any interest was vested in the King at the time of the insurance. The Dutch subjects, whose security was one principal purpose, at least, of this statute, were, at the time of effecting this policy, the owners, and possessed the only insurable interest in these ships, which

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they would have retained to this day, but for the declaration of hostilities. If the King was entitled to insure before the event, it follows that during a certain period both might insure in respect of the same identical interest in the same ship or goods, and for the same time. The Court must at this time determine on the same grounds as if the loss had happened on the very next day after effecting the policy, and the cause had been decided on the day after; and the Court would then have been compelled to say that the Crown had no interest. 2. Whatsoever may be the right of a principal to ratify, it must appear that the contract was made for and on the account of the party ratifying. But this policy was effected by the defendants in error, as commissioners for the sale of Dutch property, in their official capacity created by statute, not as agents for the Crown. The answer of the Lords of the Treasury is addressed to them under the former title; it merely conveys the opinion of certain great officers of the Crown that it would be advisable to insure, but it does not say that the property should be insured in the name, or on the behalf of the Crown. If a broker, having been employed by an order couched in these terms, had insured the ships and goods, specifically [* 340] * and absolutely as the property of the Dutch proprietors, he would not have been responsible for any misconduct in not having insured them on the behalf of His Majesty. If he had insured them in the name of the Crown, he could not, relying on this letter, have called upon the Crown by petition of right or otherwise to reimburse him the premium. The advice which the Crown gave under the belief that the interest was in others, cannot entitle His Majesty to the benefit of the policy, though the interest should afterwards prove to be in himself. If the insurance is once effected for the benefit of A., B. has no right at a subsequent time to adopt it. Conceding that a policy effected for all whom it may concern, might in many cases be good, yet if the broker had received from A. no instructions to insure, he could not afterwards declare the interest to be in A. And it is immaterial whether it appears on the face of the policy, or is extrinsically shown, that the insurance was not effected for the benefit of the person interested. 3. There is no other subsequent ratification of the contract than the letter from the Lords of the Treasury, written on the day of effecting the policy; its effect extends no further, if considered as a ratification, than it does if considered

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as a previous authority; and in either point of view it amounts only to a declaration that it was a wise act of management in the Dutch commissioners to insure the property.

R. Carr was to have argued on the same side, but was prevented by indisposition, and the Court having strongly intimated their opinion, the plaintiff in error, on the following day, waived the privilege of being further heard by counsel, whereupon their Lordships, without calling upon the defendants in error for any argument,

Affirmed the judgment.

ENGLISH NOTES.

In *Palmer v. Pratt* (C. P. 1824), 2 Bing. 183, 27 R. R. 583, the plaintiff, who was indorsee of certain instruments purporting to be orders by A. upon B. to pay money thirty days after the arrival of a ship, insured the instruments as "bills of exchange." The ship having been lost with the bills of exchange on board, it was held that the plaintiff had no insurable interest; because the instruments, being orders for payment of money upon a contingency, were not bills of exchange (see now Bills of Exchange Act, 1882, ss. 3, 11 (2)), nor did they constitute any valid contract between the plaintiff and either A. or B. for payment of the money. Other decisions on the ground that there was no enforceable contract, and therefore no insurable interest, are *Knox v. Wood* (1808), 1 Camp. 543, 10 R. R. 746; *Stockdale v. Dunlop* (1840), 6 M. & W. 224.

The Prize Act of 1805 (45 Geo. III., c. 72, s. 3), which remained in force during the then present war, expressly declared that the captors should have the entire interest after adjudication as prize. Under this Act captors had an insurable interest in a ship taken by them. *Stirling v. Vaughan* (1809), 11 East, 619, 11 R. R. 276. But this Act is long since expended and is formally repealed by 27 & 28 Vict., c. 23; and the Naval Prize Act, 1864 (27 & 28 Vict., c. 25, s. 55 (2)), contains an express proviso against any interest being created except by grant of the Crown. It is clear that an expectation founded upon the practice of the Crown in administering a discretion vested in it would not create an insurable interest; as was decided upon an alleged practice of the French Government in the case of *Devaux v. Steele* (1840), 6 Bing. N. C. 358. And see *Routh v. Thompson* (1st action, 1809), 11 East, 428, 10 R. R. 539.

It may be observed that on a sale of goods the question of insurable interest frequently, though not necessarily, depends on the question whether the property in the specific goods has passed to the buyer. This criterion was much relied on in the case of *Anderson v. Morice*

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(1873-6), L. R. 8 C. P. 613, 10 C. P. 609, 1 App. Cas. 713, 44 L. J. C. P. 341, 46 L. J. C. P. 11, 32 L. T. 355, 35 L. T. 566. The contract was for purchase of "the cargo of new crop Rangoon rice per *Sunbeam*." The ship sunk while the loading was going on; and the question was whether the purchaser had an insurable interest in the bags of rice which had already been placed on board. The Court of Common Pleas by an unanimous judgment (Lord COLERIDGE, Ch. J., BRETT, J., and DENMAN, J.) held that the purchaser had an insurable interest; being of opinion that the property, and at all events the risk, in these bags of rice had passed to him. The Court of Exchequer Chamber by a majority (BRAMWELL, B., BLACKBURN, J., LUSH, J., POLLOCK, B., and AMPHLETT, B., *diss.* QUAIN, J.) reversed this judgment. The House of Lords were equally divided in opinion, Lords CHELMSFORD and HATHERLEY holding that the purchaser had an insurable interest, and Lords O'HAGAN and SELBORNE that he had not; and so the judgment of the Exchequer Chamber to the effect that the purchaser had no insurable interest stood affirmed. With this case may be contrasted the case of *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.* (P. C. 1886), 12 App. Cas. 128, 56 L. J. P. C. 19, 56 L. T. 173, 35 W. R. 636. The question arose out of a reinsurance of risk insured by purchasers of a cargo of wheat to be shipped "f. o. b." a certain vessel which had been chartered by those purchasers. It was held that the risk of the wheat which had been placed on board, although the cargo had not been completed, had passed to the purchasers; and that the right which they would have had to return the wheat in the event of the sellers neglecting without lawful excuse to complete the cargo did not prevent those purchasers having an insurable interest.

A carrier, being himself liable as an insurer, has an insurable interest in the goods carried. *Crowley v. Cohen*, No. 6, p. 314, *post*. And so has any bailee who has by special contract undertaken a similar liability. *Hill v. Scott* (1895), 1895, 2 Q. B. 371, 64 L. J. Q. B. 635, 73 L. T. 210 (affirmed C. A.), 1895, 2 Q. B. 713, 65 L. J. Q. B. 87, 73 L. T. 458; *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.* (C. A. 1877), 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. 629.

AMERICAN NOTES.

This subject was very thoroughly discussed in *Trade Ins. Co. v. Barracliff*, 45 New Jersey Law, 543; 46 Am. Rep. 792 (1883), where the holding was that a husband, in possession and enjoyment, with his wife, of her real and personal property, with an inchoate right of curtesy, has an insurable interest in both. The Court said: "It is certain, from a multitude of decisions, that

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an estate, either legal or equitable, is not essential to such an interest. Two or three cases may be cited as illustrative of this proposition.

“In the leading and hotly contested case of *Craufurd v. Lucena* the matter was very thoroughly discussed by almost every Judge at Westminster.” (Then follows a detailed statement of the case.)

“Now upon this case it may be remarked that at the time of the insurance and of the loss, even the King had no title to the vessels, for as Lord ELDON said (2 Bos. & P. N. R. 319, p. 191, *ante*), ‘if a ship be taken by hostile force, the title to that ship, as against foreigners, cannot be changed by any act of local legislation, but the ship must be condemned in a Court proceeding according to the law of nations, on rules binding not only on the subjects of the country where the Court is held, but on foreigners who are not so.’

“Nor was the Crown in rightful possession, even, for the owners of the ships were not enemies, and the seizure was an act of power merely, not of right. Yet because of the probability that the King’s possession would become rightful by a declaration of war, and that he would become entitled, *jure coronæ*, to the value of the vessels by a legal condemnation, it was held that the King had an insurable interest in them at the time of their loss, and that he was entitled to the full amount insured. It may be further remarked that the plaintiffs, who effected the insurance and successfully prosecuted the suit, had never either possession or right to possession of the ships, or any beneficial interest in them, or any express authority to effect insurance on behalf of any person beneficially interested, but were merely so situated that in the event of the ships coming into a British port before war was declared, they would be empowered to take possession and dispose of them according to instructions; yet out of the probability that circumstances might occur which would call for the exercise of this power, there were deduced an authority to insure the King’s interest, and a right to recover by suit in their own names the sum insured. Concerning an insurable interest, LAWRENCE, J., who thought with CHAMBRE, J., that the commissioners had no such interest, nevertheless said (2 Bos. & P. N. R. 301, p. 176, *ante*), and his views have the approval of BLACKBURN, J., in *Wilson v. Jones*, L. R. 2 Exch. 139, 150), ‘The contract of insurance is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who in consequence of such events may have intercepted from them the advantage or profit, which but for such events they would acquire according to the ordinary and probable course of things.’ . . . ‘That a man must somehow or other be interested in the subject-matter exposed to perils follows from the nature of this contract, . . . but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature.’ Lord ELDON refers to an insurable interest as an intermediate thing between a strict right or a right derived under a contract, and a mere expectation or hope (5 Bos. & P. N. R. 321, p. 192, *ante*). Other excerpts from the opinions of the learned Judges in this cause might readily be made, showing that an insurable interest is a much broader thing than title, either legal or equitable, but the judgment itself suffices. If it be said that this

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was a maritime insurance, it is also true that there is no distinction between marine and fire policies, as to the kind of degree of interest necessary to constitute the basis of the policy. Phillips on Ins., § 346.

"Other jurisdictions have adopted similar sentiments. In *Herkimer v. Rice*, 27 N. Y. 163, it was decided that an administrator of an insolvent estate had an insurable interest in the real property of his intestate, derived from his right to have the realty sold to pay debts, in case of insufficient personal assets. In *Hancox v. Fishing Ins. Co.*, 3 Sumn. (U. S. Circ. Ct.) 132, Judge STORY said: 'An insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re* or *jus ad rem*. Inchoate rights founded on subsisting titles, unless prohibited by the policy of the law, are insurable.' And in *Hooper v. Robinson*, 98 U. S. 528, Justice SWAYNE said: 'A right of property in a thing is not always indispensable to an insurable interest. Injury from its loss or benefit from its preservation to accrue to the assured may be sufficient, and a contingent interest thus arising may be made the subject of a policy.' But I need not multiply citations; many others will be found collected in 2 Am. L. Cases, 797, in notes to *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81. Mr. May, in his treatise on Insurance (§ 80), draws from the cases the general principle that whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest."

The principal case is characterized by Mr. May (1 Ins., § 77) as "a noted case," and is set forth at considerable length, the writer observing: "In this discussion were engaged, on one side or on the other, most of the Judges of the different Courts, and amongst them some of the ablest that ever adorned the British judiciary; and in its different stages the cause will be found to be an invaluable storehouse of learning upon this much-vexed question of insurance law, which will abundantly reward the most careful perusal."

The principal case is also commented on at great length by the Court in *DeForest v. Fulton Fire Ins. Co.*, 1 Hall (New York Super. Ct.), 84, is said to be "entitled to the highest consideration," and is approved to the doctrine that "the actual possession of property, coupled with the right of possession, may confer upon the holder, who has neither the legal title nor the absolute interest, the power to insure it as his own," and is applied to the case of a commission merchant insuring the goods of his principal which he holds for sale. See to the same effect *Shaw v. Aetna Ins. Co.*, 49 Missouri, 578; 8 Am. Rep. 151.

Mr. Parsons pays a great deal of attention to the principal case (1 Marine Insurance, p. 203), and observes: "We have dwelt on these cases, because they are exceedingly instructive upon the difficult question, what will render an expectancy sufficient to create an insurable interest in the property to which the expectancy is attached. But the main question raised in those cases would seem to be settled in the United States against an insurable interest in prizes, unless there be a law giving a share in them, or an actual grant from the government. *The Joseph*, 1 Gallison, 545; s. c. 8 Cranch, 451,

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in which Mr. Justice STORY says: "The sole and exclusive right to all prizes vests in the government, and no individual can acquire any interest therein, unless under its grant and commission: and all captures therefore made without such grant and commission inure to the use of the government, by virtue of its general prerogative." That case was affirmed in *The Siren*, 13 Wallace, 389, but neither case discusses the subject of insurance.

The principal case is cited and commented on at great length, and with approval, by DENIO, Ch. J., in *Herkimer v. Rice*, 27 New York, 163 (A. D. 1863), in which it was held that heirs may insure, after the death of their ancestor, for their own benefit alone, notwithstanding their interest is liable to be defeated by sale of the lands for debts. The Court observed: "I have remarked at some length upon this case, because it is the only one I have been able to find in which the question of insurable interest was considered upon the principle, and because it underwent an examination of unusual thoroughness and ability. The decision, if any can be said to have been made, is of less importance than the statement of the principles upon which the question of interest depends, which statement seems to have been concurred in by all the eminent Judges who took part in the discussion. The interest of the creditors, in the present case, would be sufficient to support a contract of insurance, according to the views of all the Judges. No property in the thing insured is required. It is enough if the assured is so situated as to be liable to loss, if it be destroyed by the perils insured against. Creditors having no other means of enforcing their debts, but having a direct and certain right to subject the real estate to a sale for their benefit, have an interest as positive and absolute as one having a specific lien, or even as the owner himself. It is not all in the nature of an expectation, such as a presumptive heir has in the estate of his ancestor, which may be cut off by an alienation, a will, or by his own death. Lord ELDON, indeed, suggests that the interest should be derivable out of some contract about the property insured, but it is plainly the same thing, if the arrangements which the law makes place the insured in a position where he must inevitably suffer loss, if the property is injured by the perils against which the insurance is intended to protect him. It is well settled that insurers may reinsure the same property, yet they have no estate in or lien upon it. (*Brown v. Curtiss*, 2 Comst. 225.) So of the lender of money upon bottomry and *respondentia*. (1 Phil. on Ins. 111.) So also of the interest of a supercargo, who by contract is to be paid out of the proceeds of the cargo upon its arrival at the port of destination; of parties entitled to freight on the arrival of the vessel, and the like."

It is well settled that a person having a special limited interest, or who would suffer any disadvantage by the destruction of the property, either by loss of profit or otherwise, has an insurable interest, whether or not he has any lien upon, title in, or possession of the property. *Ins. Co. v. Chase*, 5 Wallace (U. S. Sup. Ct.) 509; *Putnam v. Mercantile Ins. Co.*, 5 Metcalf (Mass.) 386; *Ins. Co. v. Woodruff*, 2 Dutcher (New Jersey) 511; *Carter v. Humboldt Ins. Co.*, 12 Iowa 287. Such are the interests of a reversioner, mortgagor, mortgagee, creditor having a lien, consignee, factor or agent having a lien for advances, a mechanic having a lien for labor or materials, a builder, a com-

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mission merchant entitled to commissions on sales; or any person having possession under a contract that may afford him profit or emolument; a charterer, a warehouseman, wharfinger, common carrier or bailee; a landlord having a lien on his tenant's goods, a sheriff who has taken goods on process; vendor or vendee under an executory contract of sale; executors, administrators, partners, assignors, lessees, and trustees. To this doctrine may be cited *Kenny v. Clarkson*, 1 Johnson (New York), 385; 3 Am. Dec. 336; *Bell v. W. M. & F. I. Co.*, 5 Robinson (Louisiana), 423; 39 Am. Dec. 542; *Bartlett v. Walter*, 13 Massachusetts, 267; 7 Am. Dec. 143; *Clark v. Washington, &c. Ins. Co.*, 100 Massachusetts, 509; 1 Am. Rep. 135; *Imperial F. Ins. Co. v. Dunham*, 117 Penn. St. 460; 2 Am. St. Rep. 686; *Strong v. Manuf. Ins. Co.*, 10 Pickering (Mass.), 40; 20 Am. Dec. 507, with extended notes, 510; *Rochester Loan & B. Co. v. Liberty Ins. Co.*, 44 Nebraska, 537; 48 Am. St. Rep. 745; *Murdock v. Franklin Ins. Co.*, 33 West Virginia, 407; 7 Lawyers' Rep. Annotated, 572. In *Insurance Co. v. Chase*, *supra*, the Court said: "That a trustee having no personal interest in the property may procure an insurance on it is a doctrine too well settled to need a citation of authorities to confirm it. As early as 1802 the Judges of the Exchequer Chamber, in the case of *Lucena v. Craufurd*, held that an agent, trustee, or consignee could insure, and that it was not necessary that the insured should have a beneficial interest in the property insured; and the rule established by this case has ever since been followed by the Courts of this country and England;" citing *Columbian Ins. Co. v. Lawrence*, 2 Peters (U. S. Sup. Ct.), 25; 10 *ibid.* 510; *Swift v. Mut. F. Ins. Co.*, 18 Vermont, 313; *Goodall v. New Eng. F. Ins. Co.*, 25 New Hampshire, 186; *Putnam v. Merc. Ins. Co.*, *supra*; *Craufurd v. Hunter*, 8 T. R. 13; *Gilman v. Dwelling-House Ins. Co.*, 81 Maine, 488. In the last case the Court said: "Whenever a person will suffer a loss by the destruction of the property, he has an insurable interest therein." "The rule is well settled that it is not necessary to support an insurance that the insured should have an interest, legal or equitable, in the property destroyed. It is enough if he is so situated with regard to it that he would be liable to loss if it is destroyed or injured by the peril insured against." *Berry v. Am. Cent. Ins. Co.*, 132 New York, 49; 28 Am. St. Rep. 548.

No. 2. — EBSWORTH v. ALLIANCE MARINE INSURANCE COMPANY.

(C. P. 1873.)

RULE.

A CONSIGNEE having the legal property and immediate right to the possession under the bills of lading, and the power to sell and manage the consignment, is entitled to insure in his own name and to recover in an action on the

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policy to the full value of the goods, averring the interest in himself.

Whether a consignee for sale having accepted bills of exchange against the consignment—the bills of lading being in the hands of the bankers who have discounted the bills of exchange, but the consignees having the right to obtain them upon payment of those bills—have the like insurable interest, *quære?* The better opinion appears to be that they have.

Ebsworth and others v. Alliance Marine Insurance Co.

L. R. 8 C. P. 596–645 (s. c. 42 L. J. C. P. 305; 29 L. T. 479).

Marine Insurance. — Insurable Interest. — Extent of Right of Consignees (under Advances) to insure and recover in their own Names.

The plaintiffs, merchants in London, were in the habit of receiving [596] consignments of cotton from correspondents abroad, and amongst others from Bell & Co., of Bombay, making advances thereon by acceptances against the consignments. For the purpose of covering these consignments and their advances, the plaintiffs effected open floating policies with the defendants, an insurance company, expressing that the insurances were made by them “as well in their own names as for and in the name or names of all and every person and persons to whom the same doth, may, or shall appertain, in part or in all.” Each of the policies so effected was for £5000 “on cotton, etc., from Bombay to London,” etc., “by ship or ships;” and, as the plaintiffs received advices of the shipments, they declared upon the policies, in the usual way, the particulars and value of the goods and the names of the vessels by which they were shipped.

On the 29th of April, 1870, Bell & Co. advised the plaintiffs of the shipment of two hundred and fifty bales of cotton on board the *Aurora*, and of their having drawn upon them for £3000, at six months’ sight, on account of that shipment, and requesting them to insure the cotton. This bill was negotiated by Bell & Co. through the National Bank of India, with whom the shipping documents were lodged as security. The bill, with the shipping documents annexed, was transmitted by the bank to their manager in London, and on the 21st of May the plaintiffs accepted it “against delivery of shipping documents” for the cotton.

With the assent of the National Bank, the two hundred and fifty bales of cotton per *Aurora*, valued at £5000, were on the 23rd of May declared by the plaintiffs (who thereby intended to insure for Bell & Co. and themselves) upon two open policies which they then had running with the defendants; and the plaintiffs wrote to the bank undertaking “to hold the amount insured at their disposal until payment of their acceptance for £3000 due 24th November.”

The *Aurora* left Bombay with the cotton on board, and was lost at sea on the 11th of June.

The plaintiffs afterwards paid their acceptance and received the bill of lading for the cotton.

In an action upon the policies to recover for the loss of the goods, the declaration averred that the plaintiffs caused themselves to be insured, that they or some or one of them were or was interested in the goods to the amount of all the moneys by them insured thereon, and that the insurances were made for the use and benefit and on account of the person or persons so interested. The defendants traversed these allegations.

Held, by the whole Court, that the plaintiffs were entitled to recover upon these policies to the extent of their advance.

And *held*, by BOVILL, Ch. J., and DENMAN, J. (the Court being by agreement at liberty to draw inferences of fact), that the plaintiffs had an [597] equitable interest in every part of the cotton as security for their liability under their acceptance, and, being also consignees to manage the consignment, they were entitled to insure the whole of it in their own names, and to its full value, and that, having intended by the insurances to cover the interests of all parties in the cotton, they were entitled to recover the whole amount upon a declaration averring interest in themselves; and that they would hold any surplus beyond their advance, as trustees for the other parties beneficially interested; and that their right to insure and to recover was not limited to their own beneficial interest in the goods.

Held, contra, by KEATING and BRETT, JJ., that the plaintiffs were not entitled to recover under these policies, in their own names, anything beyond their actual advance, — the only interest they had in the cotton being a right by an existing contract to have the bill of lading indorsed to them on payment of their acceptance, so as to enable them to sell the cotton to pay themselves £3000 and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for the consignors; and they being at the time of the loss neither legal owners of the cotton nor in equity trustees as to the surplus for the consignors.

The plaintiffs, cotton-brokers and agents in London, were in the habit of receiving from various correspondents abroad, and, amongst others, from Messrs. Robert Bell & Co., merchants at Bombay, consignments of cotton for sale, making advances thereon by acceptances as they were from time to time advised of the shipments. The cotton so consigned to them the plaintiffs insured (sometimes with and sometimes without specific orders from their principals) by declaring them in the usual way upon open policies with the defendants and other underwriters. These policies were effected by the plaintiffs, under the firm of Irving, Ebsworth, & Holmes, "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all," and each of the policies

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was for £5000 “on cotton, lost or not lost, from Bombay to London or Liverpool direct or *via* Havre, in ship or ships.”

Having in May, 1870, received from Bell & Co. advice of the shipment of two hundred and fifty bales of cotton per *Aurora*, consigned to them on the joint account of Bell & Co. and one Cursondas Madhowdass, and of Bell & Co. having drawn upon them at six months’ sight for £3000 on account of that shipment, under the circumstances more fully detailed in the judgments of the Court *post*, pp. 221 and 250, the plaintiffs, in pursuance of instructions from Bell & Co., declared the cotton so consigned to them upon two of their open policies dated respectively the 23rd of November and the 17th of December, 1869. The plaintiffs accepted the bill “against the * shipping docu- [*598] ments for the cotton per *Aurora*,” and paid it at maturity, and received the bill of lading; but this was after the loss of the cotton. The *Aurora* left Bombay with the cotton on board, and both ship and cargo were totally lost on the 11th of June, 1870.

In declaring upon the policies, the plaintiffs alleged their interest as follows, viz., “that the plaintiffs or some or one of them were or was interested in the said goods to the amount of all the moneys by them insured thereon, and that the said insurance was made for the use and benefit and on account of the person or persons so interested.” The pleas traversed the allegations that the plaintiffs caused themselves to be insured as alleged, and that the goods or any part of them were shipped as alleged; and there was also a plea (the third) alleging that “the plaintiffs were not, nor were any nor was either of them, interested in the said goods, nor was the said insurance made for the benefit of the persons or person so interested as alleged.”

The cause was tried before KEATING, J., at the sittings at Guildhall after Hilary Term, 1872, when a verdict was found for the plaintiffs for the whole amount insured, subject to leave reserved to the defendants to move to enter the verdict for them, if the Court should be of opinion that the plaintiffs had not an insurable interest in the subject-matter of the insurance as alleged in the declaration; or to reduce the damages to £3000 in the event of the Court being of opinion that the interest alleged and proved, and the plaintiffs’ right to recover, was limited to the amount of their actual advances.

Sir John Karslake, Q. C., in Easter Term last obtained a rule

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nisi, against which cause was shown on the 20th, 21st, and 22nd of November, 1872, and the 28th of January, 1873.

H. James, Q. C., and Watkin Williams, Q. C., for the plaintiffs, contended that the plaintiffs had the whole legal interest in the goods when they accepted the draft for £3000; that all their duty to the consignees from that time was to account as trustees for them for the surplus proceeds; and that, assuming that not to be so, they still had such an interest in the goods and in every part

of them as gave them an insurable interest in the whole, [* 599] so as to *entitle them to insure them to their full value

in their own names, holding the surplus (if any) above their own actual beneficial interest in the goods as trustees for the consignors. They cited and commented upon the following authorities: *Bell v. Bromfield*, 15 East, 364; *Bell v. Ansley*, 16 East, 141 (14 R. R. 322); *Hiscox v. Barrett*, cited 16 East, 145 (14 R. R. 324); *Wolff v. Horncastle*, 1 Bos. & P. 316 (p. 265, *post*); *Page v. Fry*, 2 Bos. & P. 240 (5 R. R. 583); *Cohen v. Hannam*, 5 Taunt. 101 (14 R. R. 702); *Lucena v. Craufurd*, 3 Bos. & P. 75; 2 Bos. & P. (N. R.) 269 (p. 151, *ante*); *Carruthers v. Sheddon*, 6 Taunt. 14; *Sparkes v. Marshall*, 2 Bing. N. C. 761; *Hunter v. Leathley*, 10 B. & C. 858; *Watson v. Swann*, 11 C. B. (N. S.) 756, 31 L. J. C. P. 210; *Waters v. Monarch Insurance Co.*, 5 E. & B. 870; 25 L. J. Q. B. 102; *London and North Western Railway Co. v. Glyn*, 1 E. & E. 652, 28 L. J. Q. B. 188; *Joyce v. Swann*, 17 C. B. (N. S.) 84; *North British and Mercantile Insurance Co. v. Moffatt*, L. R. 7 C. P. 25; *Stephens v. Australasian Insurance Co.*, L. R. 8 C. P. 18; 2 Duer on Insurance, 22, 29, 74.

Sir John Karslake, Q. C., J. C. Mathew, and Cohen, for the defendants, contended that the plaintiffs had no insurable interest at all in the cotton, but a mere expectancy of profit resting on a contingency; that, if they had any insurable interest at all, it could only be to the extent of their own beneficial interest therein, viz. £3000; that they could not insure in their own names and on their own behalf to the extent of that beneficial interest; and that the only persons who, without having a beneficial interest in goods equal to the whole value, can insure in their own names to the full value, and recover the whole value, holding the surplus as trustees, are those who are in law owners and in equity trustees of the goods insured, which the plaintiffs in this case were not. They cited and commented upon the following authorities:

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Robertson v. Hamilton, 14 East, 522 (13 R. R. 303); *Ex parte Waring*, 19 Ves. 345 (4 R. C. 126); *Wolff v. Horncastle*, 1 Bos. & P. 316 (p. 265, *post*); *Lucena v. Craufurd*, 3 Bos. & P. 75, 2 Bos. & P. (N. R.) 269 (p. 151, *ante*); *Powles v. Hargreaves*, 3 M., D. & De G. 430, 23 L. J. Ch. 1; *Irving v. Richardson*, 2 B. & Ad. 193; *Stockdale v. Dunlop*, 6 M. & W. 224; *Sutherland v. *Pratt*, 11 M. & W. 296, 12 M. & W. 17; *Smith v. Vertue*, [* 600] 9 C. B. (N. S.) 214, 30 L. J. C. P. 156; *Waters v. Monarch Insurance Co.*, 5 E. & B. 870, 25 L. J. Q. B. 102; *London and North Western Railway Co. v. Glyn*, 1 E. & E. 652, 28 L. J. Q. B. 188; *Bank of Ireland v. Perry*, L. R. 7 Ex. 14; *Ex parte Smart*, L. R. 8 Ch. 220; *The Freedom*, L. R. 3 P. C. 594; 1 Arnould on Insurance, 4th ed., 54; 2 Duer on Insurance, 33, 75, 76, 78, 79, 80, 169, 173; Phillips on Insurance, 218, 416.

Cur. adv. vult.

July 15, BOVILL, C. J. — I regret to say that, after the very able arguments of the learned counsel on both sides, and the assistance which we derived from them, and after much consideration on our part, the members of the Court who heard the argument are equally divided in opinion as to the result. I will first deliver judgment on behalf of my Brother DENMAN and myself.

The action was brought upon two policies of insurance, to recover a loss upon cotton shipped at Bombay for Liverpool by a vessel called the *Aurora*. Both policies were effected by the plaintiffs in their own names, under the firm of Irving, Ebsworth, & Holmes, and were two of a series of insurances which they had effected in the usual course of their business. The plaintiffs were brokers and agents engaged in the cotton trade in London, and were in the habit of receiving consignments of cotton from Bombay for sale on behalf of the shippers, who drew bills upon the plaintiffs against the consignments. These bills were usually negotiated in India, with the bills of lading attached as security, and were then remitted to this country. The holders of the bills on their arrival here presented them to the plaintiffs for acceptance, and the plaintiffs accepted them against delivery of the shipping documents; their security being the goods in respect of which the bills were drawn. The holders of the bills of lading had no further interest in them, or in the goods which they represented, than as security for payment of the bills drawn upon

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and accepted by the plaintiffs, subject to which the plaintiffs had the right to the bills of lading as security for the amount for which they had come under acceptance against the consignment; [* 601] and they had also * the right to sell the goods for their reimbursement, as well as to earn their commission upon the sales, and had generally to manage the consignment.

The plaintiffs were in the habit of effecting insurances with the defendants to cover goods thus consigned to them; and the policies, including those now sued upon, were all in the same form, expressing in the usual way that they were made by the plaintiffs "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain in part or in all," and were each for £5000 "on cotton and [or] produce from Bombay to London or Liverpool direct or *via* Havre" "by ship or ships," and at the rate or premium per cent stated in each policy. As the plaintiffs received advices of the shipments, they declared to the defendants, and upon the policies, the particulars and value of the goods and the names of the vessels by which they were shipped.

The terms on which goods were to be shipped are contained in the following extract of a letter from the plaintiffs to Messrs. Robert Bell & Co., of Bombay, dated the 28th of October, 1869:—

"Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same, as follows:—

"You are by the present authorised to value on us at usance at the rate of £10 sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and timely insurance orders or policies of insurance; and we engage to accept your drafts so drawn on presentation, and to pay the same at maturity, or previously, at our option, under discount.

"The shipments not to exceed two hundred bales cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn."

On the 28th of April, 1870, Messrs. Robert Bell & Co. in Bombay shipped two hundred and fifty bales of cotton on board the *Aurora* for Liverpool, under bills of lading making the goods deliverable to them or order, and the freight to be paid at the port of discharge.

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On the 29th of April Messrs. Robert Bell & Co. wrote to the plaintiffs as follows : —

“ We have now the pleasure to inform you that we have induced *Mr. Cursonadas Madhowdass (respectable merchant of this place) to ship in joint account with ourselves two hundred and fifty bales new Dho Uera cotton per ship *Aurora* (freight £1 per ton), and against this shipment we have valued upon your good selves by this opportunity, through the National Bank of India, p. £3000, at six months’ sight (ex. 1s. 11½*d.*), to which we crave your kind protection. Sample of this shipment goes forward overland to your address by this mail.

“ We hope this cotton will arrive with you at a very favourable opportunity ; and, confiding the same to your care and attention, and referring to the accompanying letter for market information, we remain, &c.,

ROBERT BELL & Co.”

There was a further shipment by Messrs. Robert Bell & Co. of two hundred and fifty other bales of cotton by the same vessel ; and upon the whole of the cotton Messrs. Bell & Co. had advanced Cursonadas Madhowdass a sum of £6000.

A bill of exchange for £3000 in respect of the two hundred and fifty bales first mentioned was drawn by Robert Bell & Co., payable to their own order, upon the plaintiffs, and payable at six months after sight.

This bill of exchange was indorsed by Robert Bell & Co., and then discounted by them with the National Bank of India in Bombay ; and at the same time, as security for the acceptance and due payment of the bill, Messrs. Robert Bell & Co. placed in the hands of the bank the bills of lading for the two hundred and fifty bales of cotton against which the bill of exchange was drawn. The following letter was also signed by Robert Bell & Co., and given to the National Bank of India : —

“ BOMBAY, 28th April, 1870.

“ *To the Manager of the National Bank of India, Limited.*

“ SIR, — Having this day negotiated to you one bill of exchange drawn by us on Messrs. Irving, Ebsworth, & Holmes, of London, the particulars of which are noted at foot, and having at the same

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time as collateral securities for the due payment of the said bill indorsed to you the bills of lading and handed to you the shipping documents of the several goods, also stated at foot, — we hereby authorise you or any of your managers or agents, if you or he shall think fit, at our expense to insure the above goods from sea risk, including loss by capture, and also from loss by fire [* 603] on shore, * in case Messrs. Irving, Ebsworth, & Holmes (the plaintiffs) shall omit to do so immediately after notice from you to that effect, and to add the premiums and expenses of such insurances to the amount chargeable to us in respect of the said bills.

“We also authorise you or any such manager or agent, if you or he shall think fit, to sell any portion of the said goods which you or he may deem necessary, for payment of freight and of such premiums and expenses of insurance, and to take such charges for commission as in ordinary cases between a merchant and his correspondent.

“We also authorise you and the holders of the above bills for the time being to take, if you or they shall think fit, conditional acceptances to all or any of such bills, to the effect that, on payment thereof at maturity, the above-mentioned bills of lading and shipping documents shall be delivered to the drawees or acceptors thereof; such authorisation on our part to extend to cases of acceptance for honour.

“We further authorise you or any of your managers or agents, on default being made in acceptance on presentment or in payment at maturity of any of the above bills, to sell the said goods or a competent part thereof, and to apply the net proceeds (after deducting usual commission and charges), as far as they will go, in or towards payment of such bills, with re-exchange and charges, and to retain the surplus balance, if any, and place the same against any other of our bills which may at the time be in your hands; and, subject thereto, we request you to account for such surplus, if any, to the proper parties.

“We further authorise you or the holders of the said bills, for the time being, at any time before their maturity, to accept payment from the drawees or acceptors thereof, if required so to do, and on payment to deliver the said bill of lading and shipping documents to such drawees or acceptors; and we request that you or the holders of the said bills will allow, if required, in that event.

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discount thereon for the time such bills may have to run, at the Bank of England minimum rate of the day, if taken up in London, or if in ———, at the current rate of discount of the day on government acceptances in ———, but not to exceed the rate of five per cent per annum.

(Signed)

“ROBERT BELL & Co.”

* “Bills and documents above referred to : —

[* 604]

Particulars of Bills.			Particulars of Goods.	
Date.	Amount.	Drawee.	Bill of Lading	Name of Ship.
Ap. 28, 1870.	£3000	Messrs. I., E., & Holmes.	250 bales cotton, R. B. & Co.	<i>Aurora.</i>

Messrs. Robert Bell & Co. at the same time also handed to the National Bank an order for insurance addressed to the plaintiffs, in the following terms:—

“BOMBAY, 28th April, 1870.

“MESSRS. IRVING, EBSWORTH, & HOLMES, London.

“DEAR SIRS, — We have to request you will effect English insurance on two hundred and fifty bales of cotton shipped by us per *Aurora* for Liverpool, to the extent of £20 per bale, and will thank you to deliver the policy to the National Bank of India, London, with their lien duly secured thereon, to be held by them until payment of our draft on you for £3000, dated 28th April, 1870. We beg to add that, should you omit to effect insurance, the bank will be at liberty to insure the shipment for their own protection, and recover the cost from you before giving up the bill of lading.

(Signed)

“ROBERT BELL & Co.”

The letter of hypothecation was countersigned by Cursondas Madhowdass, who was interested with Bell & Co. in the adventure; and he also indorsed the bill of exchange, and wrote and gave to the National Bank a letter addressed to the plaintiffs (but which was not shown to them until after payment of their acceptance), in the following terms:—

“BOMBAY, 29th April, 1870.

“Messrs. IRVING, EBSWORTH, & HOLMES.

“GENTLEMEN, — I beg to advise you that I have shipped to your care, through Messrs. Robert Bell & Co. of this place, the under-mentioned cotton; and I enclose invoice thereof, amounting to R.38,981. 6. Against the same I have drawn upon you as at foot, with the indorsement of the above-mentioned firm, and I beg your

kind protection to my draft. I shall also feel obliged by [* 605] *your effecting insurance to the extent of £18 p. B.

(eighteen pounds per bale). On arrival of the shipment, please sell it to the best advantage, remitting to me any balance that may be due hereafter. Should, however, the net proceeds fall short of the amount of your acceptance, together with any charges that may have been incurred by you, I hereby authorise you to draw upon me at usance for the difference, and I agree to honour any such draft or drafts that may be passed upon me, and also to accept as correct all accounts that may be rendered.

(Signed)

“CURSONDAS MADHOWDASS.”

Then followed particulars of the shipment, describing by marks the two hundred and fifty bales new Dho Uera, per *Aurora*, and bill dated 28th April, 1870, for £3000, adding, “The cotton sample sent to you represents fair average quality of the two hundred and fifty bales.”

No bill of exchange, however, was drawn by Cursondas Madhowdass in respect of the two hundred and fifty bales of cotton now in question.

The National Bank of India remitted the bill of exchange for £3000 and the other documents which had been given to them by Robert Bell & Co. to the chief manager of their bank in London.

The bill of exchange was presented to the plaintiffs for acceptance on the 21st of May, and they gave a conditional acceptance, as contemplated by the letter of hypothecation, in the following terms: “Accepted, 21st May, 1870, against delivery of shipping documents for two hundred and fifty bales cotton per *Aurora*. Irving, Ebsworth, & Holmes.”

The order for insurance from Messrs. Robert Bell & Co. was also shown to the plaintiffs by the National Bank; and it was arranged between them that the two hundred and fifty bales of cotton per *Aurora* should be declared by the plaintiffs upon

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their open policies with the defendants' company, which were then running.

At this time the plaintiffs had effected two open policies with the defendants for £5000, one of which was dated the 23rd of November, 1869, and the other the 17th of December, 1869; and as there remained a balance of £846 not declared for upon the November policy, the plaintiffs declared that amount upon that policy, and a declaration, following other similar declarations, was made on the policy, under the general heading of "The interest attaching to the within policy is hereby declared to be shipped and valued as under," as follows, viz.:—

* "23/5/70. per *Aurora* to Liverpool direct. [Marks] [* 606] two hundred and fifty bales of cotton valued at £5000, attaching to this policy £846."

A similar declaration of interest was indorsed upon the December policy, stating it to be "Per *Aurora*, balance from preceding policy on two hundred and fifty bales cotton, valued at £5000, £4154."

These are the policies upon which the plaintiffs are now suing in this action.

The plaintiffs then sent the following letter to the National Bank of India:—

"LONDON, 27th May, 1870.

"To the Chief Manager of the National Bank of India, Limited, London.

"SIR,— We beg to inform you that we have declared on our open marine policies for £5000 dated 23rd November, 1869, £5000 dated 17th December, 1869, effected with the Alliance Insurance Company, the following shipments from Bombay to Liverpool, as per specification at foot; and we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for £3000 due 24th November.

(Signed)

"IRVING, EBSWORTH, & HOLMES."

"Goods, two hundred and fifty bales cotton, R. B. & Co.; Ship, *Aurora*; amount declared, £5000."

The *Aurora* left Bombay on the voyage in question, and was lost at sea on the 11th of June, 1870, and there was a total loss of the cotton.

On the 24th of November following the plaintiffs paid their

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acceptance at maturity, and received from the National Bank the bill of lading, which until that day had remained with the bank as security for payment of the acceptance.

The declaration contained averments (which were traversed) that the plaintiffs, or one of them, were or was interested in the goods to the amount of all the moneys by them insured thereon, and that the insurances were made for the use and benefit and on account of the person or persons so interested; and the question discussed upon the argument depended upon the issues thus raised. There was also a denial of the plaintiffs having caused themselves to be insured.

It was agreed on the argument that the Court should [* 607] be at * liberty to draw such inferences of fact as a jury should have drawn; and power was reserved to the Court to amend the pleadings, if necessary.

Upon the facts proved at the trial, it appears to us that the shipment in question was one of that description which was intended to be covered by, and which the plaintiffs were at liberty to declare, upon their floating policies. From the nature of the transactions in which they were engaged, their object in keeping on foot a succession of open policies must have been to cover shipments which might from time to time be consigned to them; and both they and the underwriters must, we think, be taken to have contemplated that the transactions would be conducted in the usual course of business, which is, that, when goods are so consigned, bills of exchange would be drawn upon the plaintiffs by the shippers, which would or might be negotiated to third parties with the bills of lading attached as security.

Before the bill of exchange in this case was accepted, the bill of lading and the goods which it represented would be a security to the holders of the bill of exchange, and the plaintiffs would have no present interest in them; but as soon as the plaintiffs accepted the bill, they became bound to pay it upon the shipping documents being delivered to them: *Smith v. Vertue*, 9 C. B. (N. S.) 214, 30 L. J. C. P. 56; and, in the ordinary course of business, when the bill arrived at maturity, upon the plaintiffs paying the amount, the bill of lading would be handed to them. It was also contemplated, as appears by the concluding part of Messrs. Bell & Co.'s letter to the National Bank, of the 28th of April, 1870, that the plaintiffs might desire to take up the bill of lading and pay the

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amount of their acceptance before maturity, and this would be in accordance with the usual course of business, in order to enable the plaintiffs, as consignees for the shippers, to take advantage of a favourable market and to make immediate sales of the cotton.

The bill of exchange being drawn by the shippers, and accepted by the plaintiffs against the consignment, that consignment immediately became an equitable security to the plaintiffs for the amount of their acceptance; and they would have been entitled in equity to have the cotton appropriated for their reimbursement. * *Ex parte Barber*, 3 M., D. & D. 174; *Ex* [* 608] *parte Mackey*, 2 M., D. & D. 136, and see also the recent case before the Lords Justices of *Ex parte Smart, Re Richardson*, L. R. 8 Ch. 220, 42 L. J. Bankr. 22, and *The Bank of Ireland v. Perry*, L. R. 7 Ex. 14, 41 L. J. Ex. 9. The plaintiffs would further be entitled to their commission on the sale of the goods, and also to be reimbursed the cost of the insurance, and their other expenses in respect of the consignment; and it was their business to sell, manage, and dispose of the cotton as consignees. The equitable interest of the plaintiffs, after coming under acceptance against the shipment, was not in any particular portion of the cotton, but in the whole and in every part of it; and no portion of it could have been withdrawn without diminishing their security. They had also the power to sell and dispose of every portion of it, and to receive the purchase-money.

Under these circumstances were they entitled to insure in their own names the whole of the cotton, and to its full value, or were they entitled to insure the cotton only to the extent of their personal liability under their acceptance?

It is clear that a mortgagee of goods by assignment would be entitled to insure the whole of the goods in his own name, and to their full value, and, in case of a loss, would be entitled to recover in his own name the full amount of the insurance, and would be a trustee for the mortgagor as to any surplus beyond the amount of his own debt. The plaintiffs, having an interest in every part of the cotton, would, as it appears to us, stand in the same position in equity as a strict mortgagee in a Court of law, and would clearly be entitled to insure themselves against the loss of the cotton, as affecting not only their security for reimbursement of the amount of their acceptance, but also their commission on the sale; but it also appears to us that, having an equitable security

upon the whole of the goods and every part of them, and the duty of selling and managing the consignment, they might, if it was so intended, insure in their own names, not only their own individual interest in the cotton, but also the interest of the other parties interested, viz., the shippers (Messrs. Bell & Co.) and the National Bank of India.

[* 609] * *Primâ facie*, an insurance by a mortgagee, whether legal or equitable, would cover only his own particular interest in the goods; but if the insurance was, as between him and the underwriters, intended to cover the interest of all parties and the whole value of the goods, there would be no objection to a legal mortgagee so insuring in his own name to cover all the interests and the entire value of the goods; and we think there is equally no objection to an equitable mortgagee, or a person who stands in a similar position, insuring in like manner. An insurable interest is clearly not confined to a strict legal right of property. It then becomes a question of fact what was the interest intended to be covered by the policy. If it was only the individual interest of the mortgagee, he could recover only the amount of that interest; but if the insurance was intended to cover the interest of the mortgagor also, then he would be entitled to recover in his own name for both interests. See *Irving v. Richardson*, 2 B. & Ad. 193. In that case the assured, though a mortgagee of the ship, had under the Registry Acts no legal ownership, but only an equitable interest in it; and yet it was considered that he might insure and recover in his own name the whole amount, if the insurance was intended to cover the mortgagor's interest as well as his own; and that whether it was so intended or not, was the proper question to be left to the jury in such a case. See also the observations of PARKE, B., in *Sutherland v. Pratt*, 12 M. & W. 17, 31 L. J. Ex. 235.

Upon the facts of the present case, and having power to draw inferences, we can entertain no doubt that the insurances effected by the plaintiffs were intended to cover the whole interest of all the parties interested in the consignments. They seem to us to have been effected for that express purpose, and to have been so treated by all parties; and we think that they must be considered in that light. It is, we believe, the common practice of consignees and underwriters to have floating policies of this description, with a view of covering the interest of all parties in the goods; and it

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seems to us that as each shipment was declared the policies would enure for the benefit of the different parties who were interested in the goods so declared.

In this case the cotton was declared by the plaintiffs under their * floating policies after orders to insure from [* 610] Bell & Co., and with the assent of the National Bank of India; and upon the declarations being made, these policies would as to the shipment enure, not only for the benefit of the plaintiffs themselves, who were interested in the safety of the whole of the goods to cover their own liabilities and claims, but also for the benefit of the National Bank of India, to secure to them the amount of the acceptance, as well as for the shippers, as the persons entitled to the surplus proceeds of the goods when sold by the plaintiffs. There was also the very possible contingency that the goods when sold might not from various causes realise the amount for which the plaintiffs had come under acceptance.

Although the insurances would, in our opinion, as they were intended to do, cover the whole value of the shipment, and all the different interests in the goods, yet, from the nature of these floating policies, and their being effected in anticipation of future transactions of the plaintiffs with various persons who were unknown at the dates when the policies were effected, they were necessarily effected by the plaintiffs in their own names; and it could not be said that as contracts they were made by the plaintiffs by order or for account or on behalf of persons who were then unknown, but who might at some future time consign goods to the plaintiffs. The consequence of this is, as it seems to us, that no action could be maintained upon the policies in question by or in the names of any persons except the plaintiffs; and, in this particular case, if it had been averred that Messrs. Bell & Co. were interested in the cotton, and that the insurances respectively were made for their use and benefit and on their account, we think that such an allegation would not have been maintained. *Watson v. Swann*, 11 C. B. (N. S.) 756, 31 L. J. C. P. 210. Neither could it have been properly alleged that the plaintiffs and Messrs. Bell & Co., either with or without the National Bank of India, were jointly interested in the cotton, and that the policies were effected on their account; for no such joint interest existed, and the policies at the time they were made were not effected on their behalf; and the only proper conclusion in law from the facts, as it appears to us, is

that the plaintiffs having effected the policies in their own [* 611] names to cover future consignments, such as * the cotton in this case, not only may, but must, sue upon the policies in their own names, and we think that the averments in this declaration that the insurances were made for their use and benefit and on their account, and that they were the parties interested, were the proper, and, indeed, the only correct mode of framing the declaration.

It is quite true that Messrs. Bell & Co. had an interest in the cotton, and were, in fact, the general owners of it, subject to the rights which they had created on the part of the National Bank of India and the plaintiffs; but, as between the underwriters and the plaintiffs, the former must, we think, be taken to have agreed that the plaintiffs might declare goods consigned to them under circumstances like the present, upon the floating policies effected by them, and that they might recover upon them the full value in their own names.

There is no doubt that in a declaration, the averments of interest, and as to the person on whose behalf the insurance is effected, must be correctly made, and that a variance in that respect would be fatal, though the interest is now allowed to be alleged alternatively in various persons. It is also not sufficient to aver the interest to be in another person, without also alleging that the insurance was made on his behalf. These averments likewise affect the evidence and right of recovery at law, though, where a plaintiff sues as trustee for another, a recovery might be had in equity from the *cestui que trust*, and relief obtained as against him.

It is quite true that, after the floating policies had been opened, and when the shipment was made, there was an order by Messrs. Bell & Co. to the plaintiffs to insure, and that by agreement with the National Bank of India the declarations of interest by the plaintiffs under these floating policies were to be treated as covering this cotton; but that would not entitle either Bell & Co. or the bank to sue upon the policies in their own names, or maintain an allegation that the policies were made on their behalf.

The law with respect to the insurable interest which a consignee may include in a policy and recover in his own name is, we think, correctly stated in the third edition of *Arnould on Insurance*, at p. 72, in the following terms: "As a general principle, [* 612] then, there can * be no doubt that consignees of the

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goods, being in advance to the consignors, or under acceptances for them, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit up to the extent of their claims in respect of such advances and the acceptances, holding the residue in trust for the consignors."

The practice of the mercantile community as well as of underwriters has also, we believe, been entirely in accordance with this view of the law; and there is this manifest convenience in it, that it saves a multiplicity of insurances upon the same subject-matter, and avoids the necessity for any nice distinctions as to the precise nature of the various interests of the several parties which are intended to be covered by the particular insurance. This more especially applies to the case of floating policies effected by consignees to cover goods of all persons who may thereafter consign goods to them, and to similar floating policies which wharfingers, warehousemen, factors, and others are in the habit of effecting to cover the owners' interests as well as their own; and it seems to us that it would lead to great practical inconvenience if a different rule were now to be laid down.

Many of the passages which were cited for the defendants from text-writers had reference only to what a person might insure on his own account; and a great part of the argument for the defendants rested on the assumption that there was, in fact, an insurance in this case of the separate interest of Bell & Co., and that these policies were made by the plaintiffs as the agents of Bell & Co. and on their behalf; but which assumption, for the reasons before stated, we consider to be not well founded.

The case of *Robertson v. Hamilton*, 14 East, 522 (13 R. R. 303), is an important decision to show that, where a person having a limited personal interest in the safety of every portion of the subject-matter of insurance insures not only that particular interest but the whole of the subject-matter to its full value for the benefit of the other parties who are interested in it as well as of himself, he will be considered entitled to recover the full amount in his own name upon an averment of interest in himself, and will be considered a trustee for the other parties interested. In that case the plaintiffs were owners of the **Ross*, which, [* 613] with another ship called the *Atlantic*, belonging to Fisher & Co., and their cargoes, had been captured as Spanish prize. The

plaintiffs and the respective owners of the other ship and of the cargoes employed one Cowan as their agent in Spain to obtain restitution or compromise the claims of the captors and to send the property back to England. He effected an arrangement by giving up part of each cargo, and upon the terms that the two ships and the rest of the cargoes should be restored for the common benefit of the original owners of both ships and cargoes in the lump; and he drew a bill upon the plaintiffs (which was accepted and paid by them) for the general expenses of effecting the arrangement, and for the outfit of the vessels on their return homewards. The agent stated in a letter to the plaintiffs, "The whole property restored is to form a mass, and the reparation made agreeably to the respective values that may be affixed to both ships and cargoes. The *Atlantic* I shall consign to you, in order to simplify the concern; and you can arrange with the owners. The above information will guide you with respect to insurance." The plaintiffs then effected an insurance upon the *Atlantic*, and that vessel was again captured by the French. The plaintiffs thereupon sued in their own names to recover for a total loss of that vessel. It was held that the plaintiffs, though not the owners of the *Atlantic*, had an insurable interest in her and to the full amount of the insurances. In the course of the argument, when the case of *Lucena v. Craufurd*, 3 Bos. & P. 75, 2 Bos. & P. (N. R.) 269 (p. 151, *ante*), was cited, Lord ELLENBOROUGH said (14 East, at p. 526): "Independent of that case, can there be any doubt but that the plaintiffs had an insurable interest? The ships and cargoes were all thrown into hotchpot; and the plaintiffs had an interest in the conjoint property, and had expended their own money upon it, and were further authorised to make the insurance, by Cowan, of Corunna, who had full powers of attorney from all the original owners of the property." And, upon its being argued that the ship insured never was in the possession of the plaintiffs, and therefore that they could have no lien on it (and which argument was also pressed upon us in this case), Lord ELLENBOROUGH said (14 East, at p. 530):

"This is no question strictly of lien. Cowan was in position of [* 614] session of the whole, and Cowan continued to be the plaintiff's agent for this purpose after the *Atlantic* and the *Ross* were thrown into hotchpot for the benefit of all concerned. The whole then became a new property, and a new interest was constituted in the former several owners conjointly, so that

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the proprietors of the ship *Ross* thereby came to have an interest in the *Atlantic*. Upon the arrangement made with the captors Cowan received restitution of the whole property in the lump, as it is said, for the common benefit of the original owners of both ships and cargoes; and then Cowan, being such agent of the conjoint interest as well as agent for the plaintiffs, consigned the *Atlantic* to them, and drew bills upon them for the general expenses of the whole concern, which they accepted and paid. If this does not give them an insurable interest, it is difficult to say what will." And, in giving judgment, Lord ELLENBOROUGH says (14 East, at p. 532): "The plaintiffs, having an insurable interest in the whole mass of the property restored, may recover upon this policy as trustees for those who are interested with themselves in the whole, though they may be afterwards called upon to divide it amongst the several claimants in the proportions due to each; and a recovery in this action will not exclude any of the parties from unravelling the account in equity." And again (14 East, at p. 534): "The assured, therefore, upon this policy are entitled to recover from the underwriters if they had an insurable interest in the ship. The question then is, who had such an interest? I answer, the original proprietors of both ships and cargoes, whose interest had been united in hotchpot through the medium of their common agent, Cowan. Cowan himself had an interest in the whole; and the plaintiffs had also an interest in respect of the bills which they had accepted and paid for Cowan on account of this conjoint property. The whole was thrown into hotchpot when it was delivered up to Cowan by the first captors; and therefore the plaintiffs, who were the original owners of the ship *Ross*, became interested in the whole. They were also interested in it as the consignees and representatives of Cowan, who had expended money upon the whole in hotchpot, and for whom they had accepted and paid bills on that account. It cannot, therefore, be said that the plaintiffs * had not an insurable interest in the subject-matter." It [*615] was held that the plaintiffs might insure and recover as for a total loss on the policy on the *Atlantic*, of which they were not the owners, though they might be responsible over to the owner of that vessel or his representatives for a proportion of the money when recovered. That case seems to us a very strong authority in favour of the plaintiffs in this action.

A similar principle has been adopted and acted upon in the

case of fire policies, where persons having a very limited personal interest, such as a warehouseman in one case, having only a lien for his charges, and not being himself an insurer by law, and a carrier in the other, had effected and kept on foot floating policies for the purpose of covering, and which were considered to cover, not only their own individual interests, but also the interests of the owners of the goods, and these persons were held to have insurable interests as against the insurers, to the full value of the goods, and to have a right to recover the whole amount of the insurances in their own names, though they would be trustees as to any surplus beyond their own individual claims for the other parties interested. See *Waters v. The Monarch Insurance Company*, 5 El. & B. 870, 25 L. J. Q. B. 102; and *The London and North Western Railway Company v. Glyn*, 1 E. & E. 652, 28 L. J. Q. B. 188.

It is true that those were cases of fire insurance, and upon policies which expressly covered "goods in trust;" but if the policies in this case were intended to cover the interests of all parties in the goods, as we think they were, then they must be treated as if they had contained express words to include all such interests; and in that view the cases above cited would be quite analogous to the present, for the purpose of considering the other question, viz., whether the persons insuring had an insurable interest in and were entitled to recover the whole value of the goods in their own names. It is upon this latter point, viz., as to the nature and extent of the insurable interest and the right to recover the full amount, that these cases seem to us to have an important bearing upon the present question. In the case of the warehouseman (who is not an insurer), *Waters v. The Monarch*

Life Assurance Company, Lord CAMPBELL, C. J., after deciding [* 616] that upon the proper * construction of the policy the interest of the general owners of the goods was intended to be covered, proceeds as follows (5 E. & B., at p. 881): "And I think that a person intrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. It would be most inconvenient in business if a wharfinger could not at his own cost keep up a floating policy for the benefit of all who might become his customers. The last point that arises is, to what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' per-

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sonal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned.' That is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest." CROMPTON, J., also says (5 E. & B., at p. 882): "The parties meant to insure those goods with which the plaintiffs were intrusted, and in every part of which they had an interest, both in respect of their lien and in respect of their responsibility to the bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every particle of the goods."

In *The London and North Western Railway Company v. Glyn*, 1 E. & E. 652, 28 L. J. Q. B. 188, where the plaintiffs were carriers, WIGHTMAN, J., says (1 E. & E., at p. 660): "The question in this case is whether the plaintiffs are entitled under this policy to recover more than their own particular interest in the goods which they as carriers had in the warehouse when it was burnt. I think that they are, and that they ought to recover the full value of the goods. They must, in my opinion, be considered as having insured the goods which they held in trust as carriers, for the benefit of the owners, for whom they will hold the amount recovered as trustees, after deducting what is due in respect of their own charges upon the goods." And again (1 E. & E., at p. 661): "It is true that this insurance is in the nature of a voluntary trust undertaken by the *plaintiffs without [*617] the knowledge of the *cestuis que trust*, the owners of the goods; but it is a trust clearly binding on the plaintiffs in equity, who will hold the amount which they now recover, in the first place, for the satisfaction of their own claims, and in the next, as to the residue, in trust for the owners. If a different construction was put on such a policy as this, it would be necessary, as my Brother CROMPTON has observed, that several policies should be effected on the same goods, and thus insurance companies would obtain several premiums instead of one in respect of what to them is the same risk." CROMPTON, J., at p. 663, also states that, in his opinion, the plaintiffs intended to insure, first, their

own interest (if any) in the goods, and, secondly, the interest of their *cestuis que trust*, the owners of the goods, and that the case of *Waters v. The Monarch Assurance Company*, 5 E. & B. 870, 25 L. J. Q. B. 102, had established that persons who are the bailees of goods have an insurable interest in them as against the assurers to their full value, although the assured may be trustees for third persons of part of the amount recovered on the policy.

In the great case of the Dutch commissioners, *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 269 (p. 151, *ante*), the ultimate decision of the House of Lords awarding a *venire de novo* rested upon the ground that general damages had been assessed in one aggregate sum for all the vessels, whereas one of them, having been lost after the declaration of hostilities, and thus become vested in the Crown, could not in any sense be considered within the jurisdiction of the commissioners. But, at the same time, the House of Lords expressed a clear opinion, adopting the views of CHAMBRE, J., and LAWRENCE, J., that the commissioners had not an insurable interest. This was, however on the ground that their authority was derived entirely from an Act of Parliament and a commission, which gave them no power or right of interference or control over any of the ships or property until after they were detained or brought into the ports of this kingdom; that up to that time the control and power over the vessels rested entirely with the Crown; that the vessels might never have come under the power of the commissioners; that they had nothing more than a mere expectation or hope and possibility that the [*618] *vessels might come under their control; and that they therefore had no insurable interest to support the policies which had been effected whilst the vessels remained abroad, and before they had been brought to this country. It was contended for the commissioners, the plaintiffs, in that case, that they had authority to sell, manage, and dispose of the vessels, and were therefore in a position similar to that of ordinary consignees, and entitled equally as such consignees to insure and recover the full amount of the insurances in their own names, under an averment of interest in themselves. It seems to us to have been considered by all the Judges, as well as by the House of Lords, to be clear law that ordinary consignees having a beneficial interest in the whole subject-matter might recover the full sum insured, under

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an averment of interest in themselves; and that if the commissioners could be considered as such consignees, they were entitled to recover. After the three arguments in the Exchequer Chamber (3 Bos. & P. 75), and the argument in the House of Lords, it was said by the majority of the Judges (2 Bos. & P. (N. R.), at p. 292), that no one ever questioned that an ordinary consignee having a beneficial interest might insure for the benefit of the owner of the goods, though a naked consignee, as he was termed, being a mere agent of the consignor, could not do so. But, as different views have been taken of the effect of the observations of the learned Judges and of Lord ELDON (who, as Chief Justice of the Common Pleas, had heard the three arguments in the Exchequer Chamber) upon the subject of insurable interest of consignees generally, it may be useful to refer to those observations more in detail. They are as follows, namely, in the judgment of the majority of the seven Judges in the Exchequer Chamber (3 Bos. & P., at p. 95): "Independent, however, of these observations, it is not necessary that an insurer should have a beneficial interest in the property insured: it is sufficient if he be clothed with the character of a trustee, an agent, or a consignee; and if these commissioners can be considered in either of these capacities, they have an insurable interest. According to the terms of the statute (35 Geo. III., c. 80), it seems as if they may be considered in either of these capacities. They may be considered as trustees for the Crown, or for the persons who shall be ultimately entitled to the property; as general agents for * the purpose of disposing of the property on its arrival [* 619] in England, or as statutable consignees." Again (3 Bos. & P., at p. 97): "Suppose a merchant upon his marriage to covenant with trustees in his marriage settlement that certain ships then upon the sea should when they came to England be vested in them for the purposes of the settlement, are we to be told that the trustees might not insure, because the settlor did not in terms convey and assign over the ships immediately? A Court of equity would consider the interests in the trustees exactly the same as if the ships had been immediately conveyed. It is objected, however, that the Dutch commissioners did not resemble consignees, because they were directed to sell and dispose of the property intrusted to them according to the directions which they should receive from government. But many consignees receive

goods with orders to attend to the directions of the consignor as to their disposal; and yet they are not the less able to insure. So every trustee is subject to the directions either of the *cestui que trust* or of the Court of Chancery." In the judgment of CHAMBRE, J., whose views were ultimately adopted by the House of Lords, he says (3 Bos. & P., at p. 104): "I am not disposed to question the authorities in general; on the contrary, there appears to me to have been great propriety in establishing the contract of insurance wherever the interest declared upon was in the common understanding of mankind a real interest in or arising out of the thing insured, or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions respecting property, still however excluding mere speculation or expectation, and interests created no otherwise than by gaming. What the parties themselves may do, they may also do by their trustees, consignees, or agents, provided the act done by an agent comes within the scope of the authority given him by his principal, either expressly or impliedly from the nature of his employment." In the House of Lords, in the opinions of the seven Judges, and in which THOMPSON, B., concurred, the following passages occur (2 Bos. & P. (N. R.), at pp. 289, 290): "It is with reference to these premises, they (the plaintiffs) aver that they as such commissioners were interested, and that the insurance was made for their [* 620] use and benefit as *commissioners. The nature of their connection with the property insured appears from the previous part of the declaration. They claimed no beneficial interest in it; they were merely consignees, agents, or trustees for others; and, to make the whole declaration consistent, the averment must be taken to import, what the words will fairly admit, that the insurance was made for the benefit of those for whose benefit the plaintiffs were authorised by the Act of Parliament and commission to manage the property as consignees, — that is, in the present instance, for the King. A consignee without any beneficial interest in himself is agent for the consignor, and may insure for his benefit; and, if such a consignee were to state in his declaration the circumstances of the consignment of goods to him to manage, sell, and dispose of for certain persons abroad, might he not aver the interest in himself as such consignee? and would not such an averment, coupled with the disclosure of his

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having no interest but for the consignors' use, be equivalent to an averment of interest in his consignors?" Again (2 Bos. & P. (N. R.), at pp. 291, 292): "Though a consignee be usually appointed by bill of lading, it is not necessary to invest a person with that character. Mr. Justice BULLER, in the case of *Wolff v. Horncastle*, 1 Bos. & P. 316, 322 (4 R. R. 808), defines a consignee to be a person residing at the port of delivery, to whom the goods are to be delivered on their arrival. A consignee, as distinguished from a vendee, is the mere agent of the consignor; and such a consignee may be appointed by any direction, verbal or written, to the captain, to deliver the goods to such particular person, or by a letter to the person himself requesting him to take care of the goods upon their arrival. Where, then, is the difference between such a consignee and these commissioners? The ships were directed, by the person who had the possession and power to direct the voyage, to Great Britain; and the commissioners were appointed to receive the ships and cargoes, and to manage and dispose of them upon their arrival. What is the effect of the most solemn appointment of a consignee different from this? What greater interest or closer connection with the ship does he acquire? If, then, there be no difference, no one ever questioned that a consignee or agent of the description spoken of might make an insurance for the benefit of the owner and person entitled, and for whom he as consignee is *autho- [*621] rised to act." . . . "At the time both of the insurance and the loss, their (the commissioners') title, like that of a consignee, was inchoate; occupancy was necessary to perfect it. It is true that their interest was revocable. But so is that of a consignee." Again (2 Bos. & P. (N. R.), at p. 294): "And if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds." Mr. Justice CHAMBRE, who thought that the commissioners had no insurable interest, says (2 Bos. & P. (N. R.), at p. 298): "The duties of their office were confined to Dutch property that was actually in the kingdom, and provisionally detained there under the King's authority. No matter who brings it in. They have nothing to do as commissioners with consignments from abroad; nor was any consignment in fact made to them. They have been called statu-

table consignees. If that phrase means anything, it must mean that the statute had consigned these particular ships to the commissioners; but look at the statute, and we find nothing more than that it authorises a commission under which, whatever property of a certain description arrives, it will, if they continue commissioners, fall within their care and management officially, to prevent its perishing. But the Act had in no respect attached upon this property: it had only created a capacity to the plaintiffs in certain events to receive these or any other Dutch ships or merchandises." Again he says (2 Bos. & P. (N. R.), at p. 299): "A consignment is a species of mercantile conveyance operating upon the particular effects consigned, which, though it may be defeasible, may operate in the mean time, and enable the consignee by his acts to bind the consignor."

In the opinion of LAWRENCE, J., who also thought that the commissioners had not an insurable interest, and whose opinion was also adopted by the House of Lords, there are the following passages (2 Bos. & P. (N. R.), at p. 304): "Conceiving for these reasons that the contract of marine assurance is not from its nature confined to protect the interest arising from the ownership of the subject exposed to risk insured against, I shall proceed to consider," &c. "Had they (the commissioners) been authorised generally to take care of ships *detained by His Majesty's orders, by the act of detainer the ships would have become objects of their concern, and from thence a duty might possibly have been inferred to take all proper steps to prevent any damage from their loss, and an averment that the defendants in error insured as such commissioners might have borne the meaning which has been contended for. But that cannot be understood in this case; for the averment in effect refers their interest to the Act of Parliament and their commission, the terms of which respect only the case of ships and goods detained and brought into the ports of this kingdom: and I know not how to conceive an interest dependent on a thing with which thing the persons supposed to be interested have nothing to do. The defendants in error have been considered as trustees or consignees, who, it is said, have an insurable interest. But I do not think they can be considered as trustees or as consignees having such interest as will support this averment. A trustee who has an insurable interest must, as I conceive, have some existing right

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to the thing insured for the benefit of another ; but the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as consignees in whom any interest or right is vested by bill of lading or other instrument or consignment by which the property of the subject-matter of the consignment *primâ facie* will pass. If they be consignees, they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees, according to the common understanding of that word ; and, taking them to be naked consignees who have not the legal property of the subject-matter of the insurance, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made, whether they were defined persons or uncertain persons, and not in themselves as commissioners ; for, taking the meaning of the word ‘ interest ’ to be what I have stated it to be, it is obvious that a naked consignee who means that the insurance should be applied to the protection of the things insured and the indemnification of him who suffers by losing the value of those things, his object being not to secure himself from some damage consequential to the loss as his commission, but that others interested as proprietors * should be indemnified, — it is obvious, I say, [* 623] that such consignee can himself suffer no prejudice by the total or partial destruction of a thing which forms no part of his property. In the safety of such thing such naked consignee can in this view have no interest. The persons prejudiced by the loss of property are his consignors, or those for whose benefit the property is to be disposed, and in them only in such case and in such light is there any interest.” (2 Bos. & P. (N. R.), at pp. 306, 307.)

Lord ELDON, in giving judgment in the House of Lords, says, (2 Bos. & P. (N. R.), at p. 324) : “ With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may therefore insure. So, a consignee has the power of selling ; and the same may be said of an agent. I cannot agree to the doctrine said to be established in the Courts below, that an agent may insure in respect of his lien upon a subsequent performance of his contract ; nor can I advise your Lordships to proceed, without much more dis-

cussion, upon authority of that kind. There are different sorts of consignees: some have a power to sell, manage, and dispose of the property, subject only to the rights of the consignor. Others have a mere naked right to take possession. I will not say that the latter may not insure, if they state the interest to be in their principal."

LORD ELLENBOROUGH and LORD ERSKINE concurred entirely in the views of LORD ELDON.

In the previous case of *Craufurd v. Hunter*, 8 T. R. 13 (4 R. R. 576), in the Court of King's Bench, where precisely the same points arose, it was considered that the commissioners were in the nature of consignees, and had therefore a right to insure and to recover the whole sum insured in their own names; and it appears to us that the correct opinion to be collected from the observations of all the learned Judges and also of the peers who took part in the judgment in the House of Lords in *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 269 (p. 151, *ante*), is, that an ordinary consignee, who has made advances or come under acceptance, and has a beneficial interest in the subject-matter, is entitled to insure to the full value and recover the whole sum insured, and to aver the interest to be in himself.

[* 624] * In *Carruthers v. Sheddon*, 6 Taunt. 14, the plaintiffs by order from Dowrick & Way had effected an insurance upon coffee in which Dowrick & Way were interested to the extent of seven-sixteenths jointly with three other persons. The policy professed to be made by the plaintiffs as agents and by order of and for account of Dowrick & Way. The adventure was managed by Dowrick & Way, who made advances and paid what was required. GIBBS, Ch. J., held at the trial that, as Dowrick & Way were the managers of the adventure, if the policy was intended to cover the interests of the three other persons (of which the jury were to judge), the plaintiffs might, as the agents of Dowrick & Way, recover the whole amount insured; and he also thought "that Dowrick & Way, as consignees of the cargo, had an insurable interest to the whole amount, for that a consignee may insure as well as a principal;" and the Court confirmed his ruling. We are unable to discover any intimation of opinion by the Court in that case, or to see any inference that can properly be drawn from it, to the effect that a consignee who makes advances can insure and recover only to the extent of his own lien;

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and the language of GIBBS, Ch. J., which was adopted by the Court, seems to us to be exactly contrary to that view.

In *Godin v. The London Assurance Company*, 1 Burr. 489, the only question was whether, where two persons having different interests had each insured by a separate policy, this was to be considered as a double insurance, so that the amount insured was to be apportioned between the two sets of underwriters; and though some observations were made as to persons being entitled to insure for a lien, the case does not appear to us in any way to affect the main question in this case.

In *Wolff v. Horncastle*, 1 Bos. & P. 316 (4 R. R. 808), the plaintiffs had, without orders in the first instance (though their act was adopted afterwards), effected the insurance for their correspondent Lund, for whom they were under advances, and for whom they were acting in respect of the shipment in question after it had been refused by the original consignee. They had also accepted for £300 against the shipment. The declaration contained two counts, the first averring the interest *in [* 625] Lund and the second averring it in themselves. Objections were taken, as to the first count, that it could not be supported under the statute of 28 Geo. III., c. 56, for want of a previous order to insure from Lund, the principal; and, as to the second count, that the plaintiffs had not an insurable interest, and that they made the insurance on account of Lund, and not of themselves. The Court supported the verdict for the plaintiffs on the first count for the full amount, upon the facts, on the ground of ratification by Lund; but they also held that the second count was supported; for that the plaintiffs had a clear right to insure to the amount of £300 for which they were interested in the goods. The Court considered that, upon the consignment being refused by the original consignee, the plaintiffs became the consignees for Lund; and BULLER, J., said, in the course of his judgment (1 Bos. & P., at p. 323), that “a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest;” and that “the case is not at all altered by the goods not having arrived.” The plaintiffs in that case recovered the full amount of the insurance; and it does not seem to us that, because the Court thought it clear that the plaintiffs had an insurable interest to the amount of their acceptances sufficient to support the second count against the only

objection that was taken to it, and gave judgment for the plaintiffs for the whole amount insured, that therefore it is to be inferred that the Court thought the plaintiffs had no insurable interest beyond the amount of their acceptances; and more especially as that point was never raised upon the argument.

The subject appears to have been much considered in America; and in the year 1836 a case came before the Supreme Court of New York, of *De Forest v. The Fulton Insurance Company*, 1 Hall, 84. In that case a commission-merchant had effected insurances against fire upon goods in his own warehouses, "as well the property of the assured as held by him in trust or on commission," and a fire had destroyed goods belonging to his consignors as well as his own goods; and it was held that the plaintiff had an insurable interest in the goods held on commission for his consignors to their full value, and might recover the whole amount [* 626] under an averment of *interest in himself, though he

would be accountable as a trustee to his consignors for any sums beyond his own individual claims. Very elaborate judgments were delivered by the learned Judges in that case, which are well worthy of perusal; and the general principles applicable to insurable interests as regards marine insurances, as well as terrene policies against fire, are fully and very ably discussed. Mr. Duer, in his "Law of Marine Insurance," vol. 2, pp. 108, 109, refers to this case in the following terms: "It must, however, be admitted that it has been held by a Court of high authority that a consignee, as such, has in all cases an insurable interest co-extensive with the value of the property, and consequently that, when he has effected a policy in his own name, he is entitled to recover the entire loss that is claimed, on an averment in himself of a sole and exclusive interest; and this without any evidence of an authority express or implied, or of any previous advances, or of any subsequent adoption of the contract. It is true that this decision was made in relation to a policy against fire; but the reasoning of the Judges was just as applicable to a marine insurance, and has been so considered by an eminent jurist,¹ who seems to have given to their doctrine the sanction of his approval. I am, however, constrained to express the conviction that the decision thus interpreted is not sustained by prior authorities. My researches have not enabled me to discover

¹ Mr. Justice STORY.

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a single case in the English reports in which a consignee, on an averment of a sole interest in himself, has been permitted to recover beyond the amount of his own advances; but, on the contrary, there are several decisions from which the opposite doctrine, viz., that in such a case his right to recover is limited to his own beneficial interest, seems a plain and necessary deduction."

At the date when this was published — in 1846 — the English cases upon fire policies had not been decided. This decision of the Superior Court of New York is afterwards elaborately controverted by Mr. Duer in a long note at p. 161 of the same volume. With his views, however, we are entirely unable to concur. A great portion of his reasoning is founded upon the assumption which he makes at p. 167 with reference to *Lucena v. Craufurd*, 3 Bos. & P. 75, 2 Bos. & P. (N. R.) 269, that "it is not to be denied that the assured in this case * (that is, in [* 627] *Lucena v. Craufurd*) were consignees." It seems to us, however, that this assumption, and the argument of Mr. Duer which rests upon it, are not well founded. It is quite true that the Court of Queen's Bench in *Craufurd v. Hunter*, 8 T. R. 13 (4 R. R. 576), and the whole of the Judges except CHAMBRE, J., in the Exchequer Chamber, in *Lucena v. Craufurd*, 3 Bos. & P., at p. 93, and all the Judges except CHAMBRE, J., and LAWRENCE, J., in the same case in the House of Lords, 2 Bos. & P. (N. R.) 269, considered that the commissioners were in the position of ordinary consignees of the Dutch vessels and goods, and as such entitled to insure them on their own account. But the two dissentient Judges whose views ultimately prevailed, and the peers who decided the case in the House of Lords (though upon a point which applied to one only of the vessels), expressly repudiated that view of the position of the commissioners under the Act of Parliament, and considered that they had no right, interest, or power of interference or control in or over the property in any way until its actual arrival in this country; and that if they were consignees in any sense, it could only be as mere agents, or, as it was termed, naked consignees, having no beneficial interest whatever in the property, and having merely a right to take possession of it and act as agents for the owners after its arrival in this country.

We think, therefore, that it not only can be, but after the decision of the House of Lords must be, denied that the commissioners

were consignees; and, if so, a great portion of Mr. Duer's argument as to the insurable interests of consignees, which is founded on this assumption, necessarily fails.

We also think that the other conclusions which Mr. Duer has drawn from those English cases which he cites, and which have been already noticed, are not warranted by those decisions, and that he has failed to establish that the decision of the Superior Court of New York in *De Forest v. The Fulton Insurance Company*, which proceeded in a great degree upon the doctrines of *Lucena v. Craufurd*, was not well founded.¹

[*628] * Mr. Justice STORY, in his Law of Agency, § 111, refers to this subject in the following terms: "The question has often been discussed whether factors or consignees for sale have an implied authority to insure for their principal; for there cannot be a doubt that they may insure upon their own account to the extent of their own interest. The general doctrine now established is, that they may insure both for themselves and for their principal. But they are not positively bound to insure, unless they have received orders to insure, or promised to insure, or the usage of trade or the habit of dealing between them and their principals raises an implied obligation to insure. They may insure in their own names or in the name and for the benefit of their principal; and, if they insure in their own name only, they may in case of loss recover the whole amount of the value of the property insured from the underwriters, and the surplus beyond their own interest will be a resulting trust for the benefit of their principals. Whether, if they are mere naked consignees to take possession of the goods only, without a power to sell, they have a right to insure for themselves or for their principal, is perhaps more questionable; but the point has not as yet become the subject of direct adjudication." And in a note to this passage, after referring to the authorities, Mr. Justice STORY says: "The whole subject underwent much examination in the case of *Lucena v. Craufurd*; but the most ample and satisfactory discussion of it is to be found in the very elaborate opinions delivered by Mr. Chief

¹ Mr. Duer says, vol. ii. p. 166, in a note, that the case of *Craufurd v. Lucena*, in the Queen's Bench, is not reported. But it may be as well to mention that no fresh argument took place in that Court, as the same point had already been decided there in *Craufurd v. Hunter*, 8 T. R. 13, and by the bill of exceptions the case was taken at once to the Exchequer Chamber without any argument or judgment in the Queen's Bench beyond the formal entry of judgment consequent upon the verdict.

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Justice JONES and Mr. Justice OAKLEY in the Superior Court of New York in *De Forest v. The Fulton Insurance Company*," 1 Hall, 84, at pp. 100-136.

The case of *De Forest v. The Fulton Insurance Company* is cited by Mr. Phillips, 4th edition, p. 176, § 311, without dissent or comment, though in some other passages he seems rather to adopt the view that a consignee's insurable interest is limited to his own lien. In *Parsons on Insurance*, edition 1868, at p. 50, it is said: "But if the * goods are insured by a consignee, or [* 629] a warehouseman who describes them as goods in trust, he can recover not only to the extent of his lien for charges, commission, &c., but also to the full value of the goods, and the balance will be held in trust for the owner of the goods." And at p. 201: "A commission-merchant may insure for the full value of the goods consigned to him, and may recover not only what will indemnify him for the loss of his commissions, but the full value; so much of that value as is not needed to indemnify him being recovered by him for the benefit of the owners of the goods, provided he intends to insure for them, and the terms of the insurance are wide enough to cover their interest, and he has their previous authority to insure or their subsequent ratification of his act."

Upon the whole, it appears to us that the weight of authority in America, as well as in this country, is against the views of Mr. Duer; and, with all respect for so learned a writer, we cannot subscribe to his opinions upon the subject.

We adhere to the law as stated by Mr. Arnould and by the Superior Court of New York, and by Mr. Justice STORY and Mr. Parsons, which we consider to be in accordance with the decisions of the Courts and the opinions of the great majority of the Judges in this country, which have been already referred to. We believe it also to have been adopted in practice by merchants, agents, and underwriters, for a long series of years, without inconvenience or objection; and we are of opinion that the plaintiffs had an insurable interest to the full value of the cotton, and that the whole interest of all parties was covered by and recoverable by the plaintiffs in their own names, under the policies in this case.

The effect of the plaintiffs' insuring and recovering in their own names would be to place them in the position of trustees for the other parties interested, as to any surplus beyond the amount of their own claim; and they, having received orders from Bell &

Co. to insure, and having arranged with the National Bank of India to make their open policies available by declaring the whole value of the cotton under them, did by so doing constitute themselves, in our opinion, trustees for the other parties interested.

The plaintiffs effected these policies in their own names. It appears to us that, with the concurrence of the under- [* 630] writers, * they effected them on their own behalf, and not as agents, they having then no persons as principals, and to cover goods to be thereafter consigned by various persons to them, and in every portion of which they would have an interest. The insurances were, we think, intended to cover the whole value of the goods to be declared, and the interests of the consignors as well as of the plaintiffs themselves, and, when the declarations were made, did in fact cover the interests of both. No other person except the plaintiffs could, in our opinion, sue upon these policies; nor could it be correctly alleged in the declaration that they were made on behalf of any persons other than the plaintiffs themselves; and, under these circumstances, and for the reasons before stated, we are of opinion that the allegations in this declaration were supported by the facts, and that the plaintiffs are entitled to recover the whole amount of the insurances in their own names in this action.

I will now proceed to read the judgment of my Brother BRETT, who is unavoidably absent, being upon the Circuit.

BRETT, J. — This action is brought on two policies of insurance. By the first, dated the 23rd of November, 1869, Messrs. Irving, Ebsworth, & Holmes, the plaintiffs, as well in their own name as for and in the name or names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all, did cause themselves and every of them to be assured to the extent of £5000 on cotton, lost or not lost, from Bombay to London or Liverpool direct, or *via* Havre, in ship or ships, to follow policy of the 4th of September, 1869. By the second, dated the 17th of December, 1869, the plaintiffs in the same terms as before caused themselves to be insured to the extent of £5000 on cotton, lost or not lost, from Bombay to London or Liverpool direct, or *via* Havre, in ship or ships, to follow former policy.

On the 23rd of May, 1870, £846 on the first policy was appropriated to two hundred and fifty bales of cotton per *Aurora*; and on the same 23rd of May, 1870, £4154 on the second policy

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was appropriated to the same two hundred and fifty bales of cotton per *Aurora*.

The declaration stated the interest in the cotton as follows: that the plaintiffs or some one of them were or was interested * in the said goods to the amount of all the moneys [* 631] by them insured thereon, and the said insurance was made for the use and benefit and on account of the person or persons so interested.

There were pleas traversing the allegations that the plaintiffs caused themselves to be insured as alleged, and that the goods or any part were shipped as alleged, and a plea alleging that the plaintiffs were not, nor were any, nor was either of them interested in the said goods, nor was the said insurance made for the benefit of the persons or person so interested as in the said counts alleged.

It was proved at the trial before KEATING, J., at Guildhall, that Messrs. Bell & Co., of Bombay, were correspondents of the plaintiffs, merchants in London, and that, on the 28th of October, 1869, the plaintiffs in London wrote and sent to Bell & Co. in Bombay a letter of credit, in the following terms:—

“Our previous letters of credit for advances on cotton to our consignment having expired, we beg leave to renew the same as follows: You are by the present authorised to value on us at usance at the rate of £10 sterling per bale of cotton, cost f. o. b. and freight, against shipping documents and timely insurance orders or policies of insurance; and we engage to accept the drafts so drawn on presentation, and to pay the same at maturity, &c. The shipments not to exceed two hundred bales cotton by any one vessel, and the present credit to be limited to 30th April next, unless previously withdrawn.”

On the 23rd of November, 1869, the plaintiffs effected with the defendants the first, and on the 17th of December, 1869, the second floating policy sued on. The plaintiffs on the 23rd of November, 1869, declared on the first policy cotton per *Ann Milicent*, and on the 13th of September, 1869, other cotton per *Clutha*, and so on.

It is to be taken that, in April, 1870, Bell & Co. and Cursonadas Madhowdass, of Bombay, agreed to consign cotton to Liverpool on joint account, and that two hundred and fifty bales were shipped by Bell & Co. on such joint account on board the *Aurora*. The

bill of lading, dated the 28th of April, 1870, was as follows: "Shipped, &c., by Robert Bell & Co., of Bombay, &c., two hundred and fifty bales of cotton, &c., to be delivered, &c., unto order or their assigns, he or they paying freight as per margin," &c.

[* 632] * On the same 28th of April, 1870, Bell & Co. drew on the plaintiffs a bill of exchange in the following form: "Bombay, 28th April, 1870. Six months after sight, &c., pay to the order of ourselves the sum of £3000 sterling, value received, which place to account of shipment of two hundred and fifty bales cotton per *Aurora*." This bill was indorsed in blank by Bell & Co. and then specially to the National Bank of India or order by Cursonadas Madhowdass. Bell & Co. on the same day entered into a transaction with the National Bank of India, in Bombay, which is described in the following letter written and handed by them to the bank. [See this letter set out, *ante*, p. 221.]

On the 29th of April, 1870, Bell & Co. wrote direct to the plaintiffs: "We have the pleasure to inform you that we have induced Cursonadas Madhowdass, of Bombay, to ship on joint account with ourselves two hundred and fifty bales of cotton per *Aurora*, and against this shipment we have valued upon your good selves by this opportunity, through the National Bank of India, for £3000, at six months, to which we crave your kind protection. Sample of this shipment we forward overland to your address by this mail. We hope this cotton will arrive with you at a favourable opportunity, and, confiding the same to your care and attention, we are," &c.

On the 29th of April, 1870, Cursonadas Madhowdass wrote to the plaintiffs, and sent their letter open to the bank: "I beg to advise you that I have shipped to your care through Messrs. Bell & Co., of this place, the undermentioned cotton, and I enclose invoice thereof. Against the same I have drawn upon you as at foot, with the indorsement of the above-mentioned firm; and I beg your kind attention to my draft. I should also feel obliged by your effecting insurance, and on arrival of the shipment please sell it to best advantage, remitting to me any balance, &c. Should, however, the net proceeds fall short of the amount of your acceptance, together with any charges, &c., I hereby authorise you to draw upon me," &c.

The bill of exchange or draft before mentioned for £3000,

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indorsed by Bell & Co. and Cursonadas Madhowdass, being discounted by the National Bank of India, was forwarded by them to their agents in England, together with the bill of lading and shipping documents. The draft was presented to and accepted by * the plaintiffs on the 21st of May, 1870, [* 633] in the following form: "Accepted 21st May, 1870, against delivery of shipping documents for two hundred and fifty bales cotton per *Aurora*."

On the 23rd of May, the plaintiffs declared on the open policy of the 23rd of November, 1869, £846 on two hundred and fifty bales cotton per *Aurora*, valued at £5000, and on the same day, on the open policy of the 17th of December, 1869, £4154, to make up £5000, on the same two hundred and fifty bales per *Aurora*, valued at £5,000. On the 27th of May, 1870, the plaintiffs wrote to the National Bank of India, in London, as follows:—

"We beg to inform you that we have declared on our open marine policies for £5000, dated 23rd November, 1869, and £5000 dated 17th December, 1869, effected with the Alliance Insurance Company (the defendants), the following shipments from Bombay to Liverpool; and we hereby undertake and guarantee to hold the amount insured at your disposal until payment of our acceptance for £3000, due 24th November.

"Particulars: two hundred and fifty bales cotton per *Aurora*: amount declared, £5000."

The ship and cargo were lost by the fraudulent scuttling of the ship on the 17th of June, 1870. The plaintiffs met their acceptance when due, *i. e.* on the 24th of November, 1870, and then received from the National Bank of India the bill of lading indorsed and the shipping documents.

The plaintiffs gave evidence at the trial as follows: "The insurance was effected for Bell & Co. and ourselves." A verdict was found for the plaintiffs for £5000 with leave to reduce the amount to £3000. Sir John Karslake obtained a rule calling upon the plaintiffs to show cause why the verdict should not be entered for the defendants on the third plea, on the ground that the plaintiffs had not proved that which was therein traversed; or to reduce the damages.

Before entering on an examination of the different propositions of law which have been discussed, as applicable to the relative positions of the plaintiffs, the defendants, and the other parties

mentioned in the case, it is necessary to determine accurately what that relation was.

The first transaction in evidence is the letter of credit [* 634] from the * plaintiffs to Bell & Co., dated the 28th of

October, 1869, authorising Bell & Co., within certain limits and on certain conditions, to draw on the plaintiffs.

The next transactions — and which were before any act done by Bell & Co. having reference to the plaintiffs — were, the taking out by the plaintiffs of the floating policies now sued upon, and the declarations on them of cargoes shipped on consignment to the plaintiffs by other correspondents than Bell & Co. or Cursonadas Madhowdass. These policies were therefore clearly not taken out solely to cover any goods which might be consigned by Bell & Co. They were taken out before there was any binding contract between the plaintiffs and Bell & Co. as to future shipments. They were taken out when the name of Cursonadas Madhowdass was unknown in business to the plaintiffs. They were taken out with a view to cover either any interest which the plaintiffs might afterwards have in consignment from any correspondents of theirs, or such interests and also the interests of any as yet unascertained correspondents who might consign to them. The shipment of the cotton on board the *Aurora* is to be taken to have been made on the 28th of April, 1870. It was not within the terms of the letter of credit; it exceeded the limits, and was not according to the conditions; it was not on behalf of Bell & Co. only, but on behalf of Bell & Co. and Cursonadas Madhowdass jointly. It was a shipment which the plaintiffs were not bound to recognise. Until they did recognise it they had no interest in it. Bell & Co., however, drew in respect of it on the plaintiffs.

The next transaction was between Bell & Co. and Cursonadas Madhowdass on the one part, and the National Bank of India on the other, which took place also on the 28th of April, 1870. The bank discounted the draft for £3000 drawn by Bell & Co. on the plaintiffs, and took as security an indorsement of the bill of lading of the cotton, with a power of sale if the draft should not be accepted and paid. Such an indorsement passed the legal property in the cotton to the bank, subject to a trust in favour of Bell & Co. and Cursonadas Madhowdass jointly. Bell & Co. and Cursonadas Madhowdass then both addressed the plaintiffs, requesting them to accept and honour the draft and insure the cotton,

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and authorising the plaintiffs, on payment of their acceptance, to obtain the * bill of lading and to sell the cotton, [* 635] in order, first, to reimburse the plaintiff's advance, and then, subject to commission, to hold and pay over the surplus for and to Bell & Co. and Cursonadas Madhowdass jointly. On the 21st of May, 1870, the plaintiffs accepted the draft for £3000, and thereby recognised the shipment and accepted the terms proposed to them. Then for the first time was established a relation of the plaintiffs to the cotton in question. Then arose a contract between them on the one part, and Bell & Co. and Cursonadas Madhowdass on the other, by which they undertook to pay their acceptance and to receive and to sell the cotton, and to hold and pay over any surplus proceeds, and by which they acquired a right to have the bill of lading eventually indorsed to them, and to have the cotton placed in their hands for sale to cover their advances. This contract and position of affairs did not pass the legal property in the cotton to the plaintiffs, for that was still in the National Bank of India. It did not give a present right of possession of the bill of lading, or even a right of possession of the cotton on arrival. It gave a present interest in the cotton to the plaintiffs, that is to say, a right by an existing contract to have the bill of lading indorsed to them on the payment of their acceptance, so as to enable them to sell the cotton to pay themselves £3000 and their expenses, and to earn their commission, and to hold the surplus proceeds as agents for Bell & Co. and Cursonadas Madhowdass. The right in equity would, I apprehend, be to have a decree for a specific performance of such contract. But, until the acceptance should be met, I should apprehend that the plaintiffs could not be held to be either legal or equitable owners of the cotton. Nor were the plaintiffs trustees for Bell & Co. of the cotton.

Speaking of the relation of the Dutch commissioners to the ships of which they would have had the disposal if they should have arrived, Lord ELDON says, in *Lucena v. Craufurd*, 2 Bos. & P. (N. R.), at p. 324: "With respect to the case of a trustee, I can see nothing in this case which resembles it. A trustee has a legal interest in the thing, and may," he adds, "therefore insure."

It was after entering into this relation with Bell & Co. and Cursonadas Madhowdass, and having acquired the interest in the cotton, * that the plaintiffs, on the 23rd of May, [* 636]

1870, declared £5,000 in respect of the cotton on the policies. And, whatever may have been the terms used by the witnesses in giving evidence, it must, I think, be taken with regard to the declarations then made, that it was stated "that the plaintiffs insured for Bell & Co. and themselves." In reality they intended then to declare for, and so to insure their own interest of £3000, and the interest of their correspondents in the anticipated or valued surplus of £2000.

It was whilst the transactions thus stood that the ship was lost. The plaintiffs then had the interest above described; they were not legal owners, nor equitable owners, nor trustees, but contractors having by contract certain rights to deal with the cotton in a certain way, on the happening at a future time of a certain contingency.

Afterwards, on the 24th of November, 1870, the plaintiffs paid their acceptance of £3000, and received the bill of lading indorsed by the bank. But the cotton was already lost, and no property therefore passed by such indorsement.

Upon these facts it was contended on behalf of the plaintiffs that they had the whole legal interest in the goods when they accepted the draft; and that all their obligation to Bell & Co. from that time was, to account as trustees for the surplus proceeds of sale; and, if not, that still they had an interest in every part of the goods which gave them an insurable interest in the whole, so that they might insure the whole to their full value in their own name, holding the surplus (if any) above their own actual or beneficial interest as trustees for Bell & Co. and Cursonadas Madhowdass, one or both.

It was contended on behalf of the defendants, that the plaintiffs had no insurable interest at all; that they had only an expectancy of profit resting on a contingency; that, if they had an insurable interest, it was to the extent only of their own beneficial interest, viz., £3000; that they could not insure in their own names and on their own behalf more than such interest; that the only persons who, without having a beneficial interest equal to the whole value, can insure in their own names to the full value, holding a surplus as trustees, are those who are in law owners and in equity trustees of the property insured, and that the plaintiffs were not such legal owners, and consequently not such trustees.

[* 637] * It was further argued that, if in consideration of law

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the plaintiffs could be said to have insured for themselves and Bell & Co., they failed on the pleadings, because they had invited and accepted an issue that they alone were interested and they alone had insured.

In answer to this last objection, it was urged on behalf of the plaintiffs, that the plea was severable; that, as to the allegation that the insurance was made on their behalf alone, it was true; and that there was no allegation that they alone were interested, but that the allegation amounted only to an assertion that they had an interest, which was true.

The first point thus raised is, whether the plaintiffs had any insurable interest. I think they had; because they had an existing contract with regard to the cotton by virtue of which they had an expectancy of benefit and advantage arising out of, or depending on, the safe arrival of the cotton.

The next question is, what was the amount of the plaintiffs' insurable interest. If they had any, it would seem to be at least to the extent of £3000, their advance, and their expenses and expected commission.

The main question is, whether they could insure for more than that in their own name, and recover for more on a declaration alleging the interest to be in themselves. Their relation to the cotton was described in argument, and I think fairly described, to be that of consignees for sale of goods not yet arrived, who have made advances on the goods, but have only a contract right with regard to the goods, without being legal owners of them. They have the interest described in every part of the goods, but are not legal owners of any part. The ruling principle of insurance, which is that it should afford only an indemnity to any assured for his loss, would seem to limit the right of the plaintiffs under such circumstances to the recovery of their own beneficial interest only. If in an action at law the assured can recover on the contract of insurance more than his own beneficial interest, he recovers, according to law, more than an indemnity. It would seem to be no answer in a Court of law to say that he holds a surplus of what he has recovered as trustee for some one else. The law has no means of enforcing the payment over by him, on the mere *ground of his being a trustee. This view, it is true, [* 638] should prevent a legal owner, but trustee, of the property insured from being able to insure and recover in his own name;

yet it seems to be stated on high authority that a legal owner, being trustee, may insure and recover in his own name, holding the proceeds in trust for his *cestui que trust*. This must be on the ground that the law will not dispute the legal interest which is the legal result of the legal ownership; though in insurance contracts it will also recognise an equitable interest as entitling the owner of it to enter into or take advantage of the legal contract of insurance.

In *Lucena v. Craufurd*, LAWRENCE, J., says (2 Bos. & P. (N. R.), at p. 306): "The defendants in error have been considered as trustees or consignees, who, it is said, have insurable interest. A trustee who has an insurable interest must, as I conceive, have some existing right to the thing insured, for the benefit of another." Having regard to what follows, and to the statement of Lord ELDON in the same case, the phrase "existing right," as here used, means an existing legal right. "But," continues the learned Judge, "the commissioners in this case had not any such right, and therefore cannot, according to my notions of a trustee, be considered as such. Nor can they be considered as consignees in whom any interest or right is vested by bill of lading or other instrument of consignment by which the property of the subject-matter of the consignment *primâ facie* will pass. If they be consignees, they were naked consignees for the purpose of doing some act respecting the goods consigned, and rather agents than consignees according to the common understanding of that word; and, taking them to be naked consignees who have not the legal property of the subject-matter of the insurance, and who are not beneficially interested in it, they ought, I conceive, to have averred the interest to be in those on whose account the insurance was made."

The real effect of the decision of the House of Lords in this case is well discussed by Duer, Vol. 2, p. 161 *et seq.*, in n. (2) to § 10. "The proposition to be discussed," he says, "and for the maintenance of which this case has been cited, is, that a consignee clothed with the power of sale has in all cases an insurable interest to the full value of the goods consigned to him, and may cover [* 639] them on * the voyage of importation by a policy effected in his own name and on his own account. The truth of this proposition, and the justness of its deduction from the authorities relied on, are the questions I propose to examine; but I shall first endeavour to show that the opposite doctrine, viz., that the

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right of a consignee to recover on an averment of interest in himself is limited to his own advances, constituting a lien on the goods insured (which necessarily implies that he has no insurable interest beyond those advances), is established, not by ambiguous *dicta* but by positive decisions." The learned author then minutely, and I think accurately, discusses the case of *Lucena v. Craufurd*, and sums up thus: "The result is that the final decision in *Lucena v. Craufurd* seems definitively to have settled the law, that a consignee, where he means to cover, not a beneficial interest of his own, but the entire property of the consignor, must so frame the policy as by its terms to embrace that interest; and to enable him to recover a loss, must aver that interest in the declaration, and on the trial not only prove its existence, but his own authority to make the insurance, or the adoption of his contract."

In *Wolff v. Horncastle*, 1 Bos. & P. 316 (4 R. R. 808), the plaintiff, who was held by the Court to have become before the loss the consignee of the goods, and to have advanced £300 on the security of the goods, was further held to be entitled to recover on the second count in the declaration, in which he averred the interest to be in himself. But BULLER, J., says expressly: "I hold that the plaintiffs had a clear right to insure to the amount of £300, for which they were interested in the goods."

In *Carruthers v. Sheddon*, 6 Taunt. 14, the plaintiffs were held entitled to recover the full value of the cargo, upon a count alleging the interest to be in Dowrick & Way. The cargo was shipped under an agreement by which it was stated that Dowrick & Way and two others had agreed to become partners in an adventure of sending goods which Dowrick & Way had on their own separate and personal credit actually and really purchased, &c. The jury found for the plaintiffs, and that the policy was intended to cover all the partners in the adventure. The objection taken in argument* was, not that the interest ought to have been [* 640] declared to be in all, but that Dowrick & Way could not insure more than their own interest as partners. The Court did not hold that Dowrick and Way might insure to the whole value merely on the ground of their being consignees; if that ground had been sufficient, the whole argument was futile: the Court held, in terms, "that Dowrick & Way might protect all their species of interest under one policy." Duer, Vol. 2, p. 162, holds that "the sole ground of the decision was that the advances which

they had made as consignees, added to their individual interest as partners, were equivalent to the entire value of the property insured." It does not appear in the case whether Dowrick & Co. were indorsees and holders of the bill of lading. It may be inferred from the nature of the transaction and their position that they were; and, if so, they were legal owners as well as consignees. Speaking of this case, and of *Wolff v. Horncastle*, Mr. Phillips, Vol. 1, § 423, says: "So, a consignee or other party entitled to a lien upon property on account of advances or otherwise, may cover his own interest by insurance on it in his own name generally."

In *Godin v. The London Assurance Company*, 1 Burr. 489, it was held that the English factor to whom the bill of lading was not indorsed, might insure to the full value of the goods; but on the ground that his advances were to the extent of the full value and more. "Such factor," says Arnould, Vol. 1, p. 247, abstracting this case, "had an insurable interest to the extent of his general balance, and might recover, averring the interest to be in himself."

In *Robertson v. Hamilton*, 14 East, 522 (13 R. R. 303), it is difficult to extricate the exact grounds of the decision. The interest was in two counts alleged to be in the plaintiffs; in the third count, in Fisher, Kidd, & Co., the registered owners of the ship. The plaintiffs were consignees of the ship, and had made advances the amount of which is not disclosed in the case. It was held that the plaintiffs might recover the full value of the ship "as trustees," it is said, "for those interested with themselves in the whole." If the plaintiffs were entitled to recover as agents

for Fisher, Kidd, & Co., they recovered as for the legal [* 641] registered owners. If they recovered on the counts * alleging their own interest, it may be that their advances, *primâ facie*, and until the accounts were settled in equity, were equal to the whole value. Lord ELLENBOROUGH says: "The plaintiffs had an insurable interest as upon a hotchpot right." That, I confess, I do not understand.

In *Irving v. Richardson*, 2 B. & Ad. 193, the question was whether the assured had insured in fact, that is to say, had intended to insure, more than his own interest as mortgagee. If he intended to insure only that he could keep only as much as his interest amounted to. If he had intended to insure both his own

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interest and that of the mortgagor, I collect from the judgment of LITLEDALE, J., that, in an action on the policy, he must under the new Registry Acts have alleged interest both in himself and the mortgagor. "Before the late Registry Act (6 Geo. IV., c. 110, s. 45)," he says, "the mortgagee of a ship was in point of law the owner, and might insure to the full extent of the ship's value to the mortgagor as well as to himself. But by the statute the interests of mortgagor and mortgagee are more distinctly severed than they formerly were." That says, in effect, that, when the mortgagee was legal owner, he could insure to the full value of the ship, though not beneficially interested to that extent; but now he was not legal owner, and could therefore insure and recover in his own name only to the extent of his beneficial interest.

In *Sutherland v. Pratt*, 11 M. & W. 296, 12 M. & W. 17, it is obvious that the bill of lading, indorsed generally to bearer, was delivered to the plaintiff, so that he was the legal owner of the goods. In *Crowley v. Cohen*, 3 B. & Ad. 478, the plaintiffs, who were carriers and not the legal owners, were allowed to insure and recover the full value in their own name; but it was on the ground that they were carriers, and were themselves liable for the full value. Speaking of this case, it is said in 1 Phillips on Insurance, § 424, p. 234: "This is in effect a reinsurance, as the carriers may be considered to be insurers."

In 1 Arnould on Insurance, 4th ed. p. 70, the cases of factors, consignees and agents are treated of: "There are different sorts of consignees; some have a power to sell, manage, and dispose of the property, &c.; others have a mere naked right to take possession; others, again, though not intrusted to sell, are yet* interested in the property, as having a lien or [*642] claim upon it for their advances." As to mere naked consignees, *i. e.*, those only entitled to take possession, they have, he says, no insurable interest: "They have no legal property; they are not beneficially interested." But, "with regard to consignees who have a lien or claim on the property in respect of advances, or commission-agents to whom it is intrusted for the purpose of sale, or indorsees of the bill of lading to whom a general balance is due, there is no doubt they may effect an insurance on the property in their own names and on their own account to its whole value, and recover thereon, averring interest in them-

selves, at all events to the amount of their lien, claim, or balance." It is true that he afterwards says: "As a general principle, there can be no doubt that consignees of goods, being in advance to the consignors or under acceptances for them, may insure in their own name and on their own account to the full value of the goods, and apply the proceeds of the policies to their own benefit, up to the extent of their claims in respect of such advances and acceptances, holding the residue in trust for the consignors." For this proposition he quotes *Carruthers v. Shedd*, 6 Taunt. 14, with which I have already dealt, and the American case of *De Forest v. The Fulton Insurance Company*, 1 Hall, 84. The terms of the policy, which was a fire policy, are set out in 1 Phillips on Insurance, § 311, p. 177, and they were "on goods as well the property of the assured as held by them in trust or on commission." It seems to me that this is no authority for Mr. Arnould's proposition as to consignees of goods on board ship who insure by a marine policy in the ordinary terms. And for the same reason the English cases on fire policies are no authority. The proposition may be correct, if it be applied to consignees under advance or acceptance, who are holders of bills of lading, and thereby legal owners of the goods mentioned therein.

In 1 Phillips on Insurance, c. 3, sect. 7, § 309, p. 174, the law is thus stated: "A consignee, factor, or agent, having a lien on goods to the amount of his advances, acceptances, and liabilities, stands in this respect (*i. e.*, as to his insurable interest) precisely in the situation of a mortgagee. A debt is due to him from his principal for which he holds the property as collateral [* 643] security, and the * property is at the risk of the principal, as the debt would still subsist though the property should be lost; and the excess over the proceeds of the goods would be still due to him in case of the proceeds being insufficient to satisfy his claim. He has, therefore, an insurable interest in the goods to the amount of his lien." And in § 204: "It is a familiar doctrine that a party having a lien on a vessel or cargo under a contract for advances may be rightly considered as the special owner of them to the extent of those advances, and, as such, may protect himself by insurance; and that a creditor to whom goods are assigned as collateral security has an insurable interest in them not exceeding the amount of his debt."

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To the elaborate note of Duer, *n.* 2, on sect. 10, I have already referred. In Vol. 2, p. 109, he says: "My researches have not enabled me to discover a single case in the English reports in which a consignee, on an averment of a sole interest in himself, has been permitted to recover *beyond the amount of his own advances.*"

It seems to me to follow from these authorities, and from principle, that a consignee, as such, has no insurable interest at all. "To assert the universal right of a consignee to insure the entire property on the voyage of importation, is to assert that a valid insurance may be made by a person who has no title or interest, legal or equitable, and no authority express or implied." 2 Duer, p. 111. If it is necessary to bring in some advance, or some contract giving an interest, in order to give the consignee a right to insure, it seems to me to follow necessarily, *i. e.*, logically, that the insurable interest is limited to the amount of the advance, or to the amount of the interest under the contract. It cannot be that a consignee without personal interest cannot insure at all, and that a consignee in advance to the extent of £100 can insure to £10,000, and recover such an amount upon an averment that it is the interest he has. He has no such interest.

It seems to me, therefore, both upon principle and authority, that the plaintiffs in this case, being only consignees to sell, under advance, and with a contract right to earn commission, but not being the legal owners of the cotton, could only properly insure, so as to recover in their own name, the £3000 for which they were liable on their acceptance and any commission they would have earned by selling.

* It was urged that, if that be the law, the plaintiffs [*644] could not recover at all, because they intended to insure, not only their own interest, but also the interest of their correspondents. But Duer, Vol. 2, p. 45, points out that, in *Wolff v. Horncastle*, "the judgment of the Court is an express decision that, where a policy is effected on behalf of the consignor, the consignee is at liberty to apply it to his own use to the extent of his own insurable interest, and that his claim is not answered by showing that, when he effected the insurance he expected that it was to apply exclusively to the interest of the consignor." Moreover, it may be doubted whether the policy in this case could cover an interest of Bell & Co. or Curson & Madhoddass. At the

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time it was effected, the plaintiffs had no authority, express or implied, to insure on their behalf. It may be, though I think it unnecessary to determine the point, that *Watson v. Swann*, 11 C. B. (N.S.) 756, 31 L. J. C. P. 210, is an authority for saying that a policy cannot cover the interests of persons who, at the time of effecting it, are wholly unconnected with and unknown to the person effecting the insurance. If the policy did not and could not cover the interest of Bell & Co. or Curson das Madhowdass, the declaration on the policy, though made with intent to cover those interests has no effect: *Stephens v. The Australasian Insurance Company*, L. R. 8 C. P. 18, 42 L. J. C. P. 12.

As I have come to the conclusion that the plaintiffs can recover to the extent of their own interest, and to that extent only, it seems to me unnecessary to determine the controverted question arising upon the third plea by way of traverse. I doubt whether the distinction affirmed by Mr. Duer between the allegation of interest and the allegation with respect to the party for whom the contract of insurance was made, is sound. It may be true to say that *Bell v. Ansley*, 16 East, 141 (14 R. R. 322), and *Cohen v. Hannam*, 5 Taunt. 101 (14 R. R. 702), do not necessarily overrule *Page v. Fry*, 2 Bos. & P. 240 (5 R. R. 583). But most certainly, in *Cohen v. Hannam*, Lord MANSFIELD intended to overrule it; and the reasons in favour of confining the allegation of interest are, as it seems to me, precisely the same as the reasons for confining the allegation as to the person on whose account the policy was made. It is equally objectionable to have a person [* 645] interested on the jury, as * to have a person who is a party to the contract. It is equally just that the defendant should have the opportunity of interrogating a party interested as a party to the action. The present case is a remarkable instance. It was of the utmost importance to the defendants, if their suspicions were well founded, to have the opportunity of interrogating Bell and Curson das Madhowdass.

I am of opinion that the rule should be made absolute to reduce the damages.

BOVILL, Ch. J. — My Brother KEATING, who is also absent upon the circuit, concurs in the judgment of my Brother BRETT, which I have just read.

The Court being equally divided in opinion, the rule to enter the verdict for the defendants or to reduce the damages will be

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discharged, and the defendants will be at liberty to appeal to a Court of Error.

Rule discharged. The defendants to be at liberty to appeal.

ENGLISH NOTES.

The above principal case has been selected owing to the exhaustive discussion there contained of the principle of insurable interest. It is unfortunate that the discussion, by reason of the equal division of opinion, is inconclusive. It seems necessary, therefore, to point out, that the judgment of BRETT, J. (concurred in by KEATING, J.), appears to rest upon a superstition in regard to the function and effect of a bill of lading, which has been dispelled by higher authority, as will be seen by an attentive study of *Sewell v. Burdick*, 4 R. C. 758, particularly of the judgments of Lord SELBORNE and Lord BLACKBURN. This being so, there seems no reason why the judgments of BOVILL, Ch. J., and DENMAN, J., in favour of the insurable interest of the consignee in such a case, should not be regarded as authoritative.

AMERICAN NOTES.

The first branch of the Rule is sustained by the authorities cited under the last case, especially the very learned judgment in *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y. Super. Ct.), 84, approved in the principal case. Most of the cases hereinafter cited are founded on this, and give very little discussion of the subject on principle.

A factor insuring goods held "on commission," or a warehouseman insuring goods held "in trust," may recover the whole loss. *Hough v. People's Ins. Co.*, *supra*; *Siler v. Morris*, 13 Penn. State, 218; *Lucas v. Ins. Co.*, 23 West Virginia, 258; *Stillwell v. Staples*, 19 New York, 401; *Home Ins. Co. v. Favorite*, 46 Illinois, 270; *Johnson v. Campbell*, 120 Massachusetts, 453. Probably even without that expression in the policy. *Richmond v. Niagara F. Ins. Co.*, 79 New York, 230; *Baxter v. Hartford F. Ins. Co.*, 12 Federal Reporter, 481; *Insurance Co's v. Thompson*, 95 United States, 547.

In *Sturm v. Atlantic Mut. Ins. Co.*, *supra*, FOLGER, J., said: "Whether he had control as owner or as consignee or as agent, he had an insurable interest,—that is, a right to apply for and effect an insurance upon it, which should be valid, and subsisting in his own name, on account of whom it might concern, in case of loss to be paid to him; which was the contract of insurance made by him with the defendant. An insurable interest is defined by Lord ELDON to be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. *Lucena v. Craufurd*, 2 Bos. & Pull. 269. He either owned it or he had a trust to discharge as to it, and was in some measure liable for its safety, and he had the possession, or the right of possession; and this creates an insurable interest. *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151. And see *De Forest v. Fulton Fire Ins. Co.*, 1 Hall (N. Y.

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Super. Ct.), 84, for a full and satisfactory discussion of this topic. See also *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606; 6 Am. Rep. 146.

"There can be no doubt that the policy which they obtained purported to cover not only goods which belonged to them, but also such as they held in trust or on commission, — that is, the insurance was not limited merely to their proprietary interest. It was to make good the damage to the goods, and would inure to the benefit of the consignor. Whatever the consignees might recover on such policies in excess of their own claims they would hold in trust for the consignors. *Waters v. Monarch Assurance Co.*, 5 El. & Bl. 870; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 84; *Stillwell v. Staples*, 19 N. Y. 401; " *Johnson v. Campbell*, 120 Massachusetts, 453.

Again, in *Waring v. Ind. F. Ins. Co.*, 45 N. Y. 606; 6 Am. Rep. 146, the same Judge observes: "It is laid down in broad terms that one may in his own name insure the property of another for the benefit of the owner without his previous authority or sanction, and that it will inure to the benefit of the owner upon a subsequent adoption of it, even after a loss has occurred. Angell on Ins., § 79, cited and approved by DENIO, Ch. J., *Herkimer v. Rice*, 27 N. Y. 163-181." "Agents, commission merchants, or others, having the custody of and being responsible for property, may insure in their own names, and they may in their own names recover of the insurer not only a sum equal to their own interest in the property by reason of any lien for advances or charges, but the full amount named in the policy up to the value of the property. In all such cases the right to insure and the right to recover seem to be founded upon the relation above adverted to. See *De Forest v. Fulton Ins. Co.*, 1 Hall, 84; *Stillwell v. Staples*, 19 N. Y. 401; *Siler v. Morris*, 1 Harris, Penn. St. 218. This right is put upon the fact that having the possession of the property exclusive as to all but the owner, to whom they are responsible, they have the right to protect it from loss, so that it or its value may be rendered to the owner when he calls for his own." Cited and followed in *Western, &c. Pipe Lines v. Home Ins. Co.*, 145 Penn. State, 346; 27 Am. St. Rep. 703; *Roberts v. Firemen's Ins. Co.*, 165 Penn. State, 55; 44 Am. St. Rep. 642. See also *California Ins. Co. v. Union Compress Co.*, 133 United States, 387.

Mr. May (1 Insurance, sect. 78, note), speaking of the equal division of the Judges in opinion as to the right of the consignee to recover insurance beyond his own interest, says "the authorities in this country are decidedly in the affirmative." To this effect are *De Forest v. Fulton F. Ins. Co.*; *Millaudon v. Atlantic Ins. Co.*, 8 Louisiana, 557; *Hough v. People's Ins. Co.*, 36 Maryland, 398; *Shaw v. Aetna Ins. Co.*, 49 Missouri, 578; *Aetna Ins. Co. v. Jackson & Co.*, 16 B. Monroe (Kentucky), 258; *Castner v. Farmers' M. F. Ins. Co.*, 46 Michigan, 18; *Sturm v. Atlantic M. Ins. Co.*, 63 New York, 77 (citing *Lucena v. Craufurd*); *Fire Ins. Ass. v. Merch. & M. T. Co.*, 66 Maryland, 339; *Schoenfeld v. Fleisher*, 73 Illinois, 404.

Biddle (1 Insurance, p. 161) cites the principal case, but doubts the right of the consignee, who does not hold the bill of lading to insure beyond his own interest, asking, "If a consignee without interest cannot insure at all, how then logically can one who happens to have an interest for advances, &c., insure beyond that?"

No. 3. — Wolff v. Horncastle, 1 Bos. & P. 316. — Rule.

No. 3. — WOLFF v. HORNCASTLE.

(C. P. 1798.)

RULE.

AN agent has in any case an insurable interest to the extent of his lien.

An agent effecting a policy without instructions is, if the act is ratified by the principal, “a person receiving the order to insure” within the meaning of the Act 28 Geo. III., c. 56.

Wolff and others v. Horncastle.

1 Bos. & P. 316–325 (4 R. R. 808).

Insurable Interest. — Agent. — Ratification.

A. having consigned a cargo to B. and drawn bills on him to the [316] amount of it, in favour of C. his general agent, sends these bills together with the bills of lading to C., desiring him to transmit them to B. “that B. may have an opportunity of insuring;” he also draws a bill for £300 on C., which is accepted; B. refuses to take to the cargo or accept the bills drawn on him: C. then effects a policy in his own name, and informs A. thereof, who approves of his conduct. In an action by C. stating himself in the first count to be the agent of A. and averring interest in him; in the second averring interest in himself: *held*, first, that the policy was good within 28 Geo. III., c. 56; secondly, that C. had an insurable interest to the amount of £300.

This was an action upon the case on a policy of insurance, dated the 9th of January, 1797, and made by the plaintiffs by their names and firm of Messrs. Wolffs and Dorville, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, upon goods on board the ship the *Fahrsund's Wharf*, Peter Nicolay Mohr, master, at and from Fahrsund to London, at a premium of six guineas per cent. The defendant underwrote the policy for £200, there was a total loss by perils of the sea. The first count of the declaration averred that the insurance was made by the plaintiffs as the agents of one Jochum Brink Lund, and for his use and benefit, and that the plaintiffs at the time of making thereof were persons residing in Great Britain, and did effect the policy as such agents, and that

the style and firm of Messrs. Wolffs and Dorville inserted in the policy was at the time of making thereof the usual style and firm of dealing of them the plaintiffs, and that Jochum Brink Lund was interested in the goods to the amount insured. The second count averred the interest in the goods to be in the plaintiffs, and that they made the said insurance for and on their own account.

The defendant paid the premium, viz., £12 12s., into Court upon a plea of tender, which was admitted.

The cause was tried at the Guildhall sittings after Michaelmas Term last, before EYRE, Ch. J., when a verdict was found for the plaintiffs with £187 8s. damages, and 40s. costs, subject to [* 317] the * opinion of the Court on a case, stating that Jochum

Brink Lund was a merchant resident at Fahrsund, in Norway, and had contracted with certain persons in London, carrying on trade under the firm of the Cudbear Company, to supply them with a quantity of moss: that the plaintiffs were the general agents of the said Jochum Brink Lund in London: that the said Jochum Brink Lund having, on the 12th November, 1796, shipped 574 sacks of moss at Fahrsund, in Norway, on board the said ship called the *Fahrsund's Wharf*, consigned to the said Cudbear Company in London, and upon their account and risk transmitted to the plaintiffs the invoice and bill of lading of the same, in a letter as follows: "The ship *Fahrsund's Wharf* is now loading with a cargo of moss; she will be ready to sail in the course of eight or fourteen days, and usually takes in fifty-six tons; please to hand the enclosed to the Cudbear Company, that these friends may have an opportunity to secure themselves by insuring the moss cargo, the season being so far advanced:" that the goods were by the said bill of lading to be delivered to the said Cudbear Company or order; that on the 10th of December, 1796, the said Jochum Brink Lund drew a bill of exchange on the said Cudbear Company for the amount of the said cargo, £1112 8s. 2d., at three months' sight, in favour of the plaintiffs, and remitted the same to the plaintiffs to procure acceptance thereof, and to place to his credit; and at the same time advised the plaintiffs of his having drawn on them for £300, which bill for £300 was by the plaintiffs accepted and afterwards paid: that the Cudbear Company, after having received through the hands of the plaintiffs the bill of lading and invoice of the said cargo, and having the said bill for £1112 8s. 2d. presented to them by the plaintiffs for acceptance

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on the 9th of January, 1797, refused to accept the said bill or take to the cargo, or insure the same, and returned the bill of lading and invoice to the plaintiffs: that the plaintiffs thereupon caused the above insurance to be made on the said 9th of January, 1797, without any order so to do, and on the next day by letter informed their correspondent, Jochum Brink Lund, that the Cudbear Company had refused to accept the bill or take to the cargo, or make any insurance, and that they, the plaintiffs, had made such insurance as aforesaid. On receipt of which letter the said Jochum Brink Lund, on the 28th day of January, 1797, wrote a letter to the plaintiffs, containing, among other things, as follows: "It is very well you have taken the precaution to insure the moss * cargo, hoping the Cudbear Com- [* 318] pany at the arrival of the ship will repay the premium; in the mean time, I have credited you the amount of it in your account. On the 10th instant, Captain P. N. Mohr sailed again, but on account of stormy and contrary winds, was obliged to take harbour on the west coasts of Norway, in Rasvog, without any damage, intending with the first fair wind to proceed on his voyage; not doubting at his safe arrival you will settle it with the Cudbear Company in such a manner that they, without any further objection, will take and pay the cargo as per invoice. In want of complying with the above, I shall be necessitated to commence a lawsuit against the said company, to which I will furnish you with the necessary documents." That the said Jochum Brink Lund was at the time of the said insurance being effected indebted to the plaintiffs in £1400 and upwards: that the said ship, the *Fahrsund's Wharf*, with the said cargo on board, was afterwards lost by perils of the sea in the voyage insured from Fahrsund, in Norway, to London.

The question reserved for the opinion of the Court was, whether the plaintiffs were entitled to recover? if not, a verdict to be entered for the defendant.

Le Blanc, Serjt., for the plaintiffs. — Two objections are made to the plaintiffs' recovery. To the first count, which avers the interest to be in Lund, and that the plaintiffs made the insurance as his agents and for his use and benefit, and that at the time of making it they resided in Great Britain, and effected the policy as such agents, the defendant objects that the policy was not made by the order of Lund, nor by the plaintiffs as his agents; and

therefore is void under 28 Geo. III., c. 56. To the second count, which avers the interest to be in the plaintiffs, he objects that they had no insurable interest, or, what is stronger, that they made the insurance on Lund's account, and not on their own. 1st, It appears that the plaintiffs were the general agents of Lund in this country; it was therefore their duty to take care of his interest. No express order was given to the plaintiffs by Lund to insure on his account, because he thought that the consignees, the Cudbear Company, would take to the cargo and insure. This appears by his letter, in which he directs the bill of lading to be handed to the Cudbear Company, that they may have an opportunity of securing themselves by insurance. On the Cudbear Company refusing to take to the cargo, the plaintiffs insured for Lund their principal, and immediately wrote him word of their having so done: Lund directly approved of their [* 319] *conduct, and adopted their acts. Previous to 25 Geo.

III., c. 44, it was complained of as a great inconvenience that policies being made in blank, no name appeared by which any judgment could be formed of the character of the persons interested in the risk. By that statute it was therefore enacted that no policy should be made without inserting the name or names of the person or persons interested therein, or the name or names of the person or persons who should effect the same as agent or agents of the person or persons interested, &c. After this Act, many policies were effected in the names of agents, without its being stated that they acted as agents, and great inconvenience having arisen from this circumstance, it was found expedient to repeal that statute by 28 Geo. III., c. 56, the object of which is that the name of some person residing in Great Britain shall appear on the policy, without requiring that he shall be described as agent. Then do not the plaintiffs come within the meaning of this Act? They are persons residing in Great Britain; they are the general agents of the person interested; they are the persons to whom the consignees returned the bill of lading; they are the persons to whom the owner of the cargo intimated the propriety of making an insurance, and whose acts in having insured he afterwards approved. The 28 Geo. III. having been made in order to remove the inconveniences occasioned by 25 Geo. III., the Court will not put a strict construction on it, so as to defeat the plaintiffs' title to recover. 2dly, If it were neces-

sary for the plaintiffs to have recourse to the second count, their right to insure on their own account might easily be established, since, on receiving the bill of lading from the owners, they accepted a bill for £300, which created a lien on the goods to that amount.

Shepherd, Serjt., for the defendant. — 1st, The material question is, whether the plaintiffs have effected a policy within 28 Geo. III. ? It is clear that this case is not within the words of that statute. The persons whose names are to be inserted are, the person interested, the consignor, or the consignee (none of which characters apply to the plaintiffs); the person residing in Great Britain who shall receive the order, or the person who shall give the order for effecting the insurance. Now this case states that the plaintiffs had not received any order at the time when the policy was effected; the question therefore is brought to this, whether the subsequent approbation of Lund be equivalent to a previous order? But whether the policy were well or ill effected must depend on the facts existing at the time when the policy was made; and as the plaintiffs * had [* 320] then received no order they made an unauthorised insurance. Lund might have resolved to litigate the question with the Cudbear Company, and have disowned the act of the plaintiffs, in which case they would have been entitled to a return of premium, no risk having been run. If a subsequent acquiescence be held tantamount to a previous order, it will be in the power of any person residing in England to effect a policy without order, and afterwards to set up an acquiescence, or demand a return of premium, according as the risk may turn out. I contend that the agent must have such an order at the time of insurance as will bind his principal. Now in this case, if the plaintiffs had averred that they effected the policy by order, they could not have supported the averment. There is no doubt that subsequent acquiescence in the case of a general agent may be evidence of a previous order, but the fact of a previous order is absolutely negatived by this case. 2dly, It is expressly stated in the case that the plaintiffs did not insure on their own account, but that they wrote to Lund to inform him that they had effected a policy on his account, and he agreed to credit them for the premium. However, had this not been the case, they could have had no insurable interest, for Lund desired them to hand over the bill of

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lading to the Cudbear Company, and drew on the company in favour of the plaintiffs to the amount of the goods. The plaintiffs therefore accepted the bill for £300 drawn by Lund upon them on the faith of the consignees accepting the bill drawn for the value of the goods, not on the faith of the goods arriving.

BULLER, J. — This is an action on a policy of insurance made on goods on board the *Fahrsund's Wharf*, at and from Fahrsund to London. The policy is made in the names of Wolff and Dorville, as well in their own names as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all. This policy in its frame is very much like those which we used to see some years before the Legislature interposed in the 25 Geo. III., only I remember that the words "as interest may appear" were then usually added. The ship sailed on her voyage with the goods on board; the premium was paid; it was a real *bonâ fide* transaction; and no fraud has been suggested; a loss has happened, and the underwriter now chooses to say, that for want of a strict compliance with the 28 Geo. III. he shall be excused from paying the money. Time was when no underwriter would have dreamed of making

such an objection: if his solicitor had suggested a loop-
[* 321] hole by which he might escape, * he would have spurned

at the idea. He would have said it is not a fair policy? have I not received the premium? and shall I not now, when the loss has happened, pay the money? This would have been his answer, and he would have immediately ordered his broker to settle the loss. If, however, the defendant can bring his case within the statute, he has a right to do so, and we are bound to give him judgment. But has the defendant brought his case within the meaning of the statute? has he even brought it within the words of the statute? And even if he had brought it within the words and not within the meaning, I should be clearly of opinion for deciding against him? and in so doing I should follow the directions of the statute, which in the last clause says, "every policy and policies of insurance made and wrote contrary to the true intent and meaning of this Act, shall be null and void." The objection is that the statute requires the names or style and firm of dealing of the persons interested, or the names or style and firm of the consignors or consignees of the goods insured, or the names or style and firm of the persons residing in Great Britain,

who shall receive the order for and effect the policy, or of the persons who shall give the order or directions to the agents immediately employed to negotiate or effect the policy, to be inserted in the policy. Now it is material to go back to a time previous to the passing of this statute, in order to see what was the real meaning of the Legislature. My Brother Le Blanc very properly went into a review of the 25 Geo. III., though that Act has been since repealed. By putting the two Acts together we may learn the true spirit and meaning of the last; what it was those who introduced it wished to be effected; and I might add from recollection what it was they professed. The inconvenience recited by 25 Geo. III. was the making policies in blank, and therefore it was enacted that where they were made by persons residing in Great Britain, the names of the persons interested should be inserted therein, or the names of the persons who should effect the same as agents for the persons interested, and in case of persons residing out of Great Britain, the name of the agent. Under this Act it happened that many persons not understanding the meaning of these provisions, and not complying literally with them, lost the benefit of their policies, *Pray and Others v. Edie*, 1 T. R. 313 (1 R. R. 200). The Legislature therefore thinking that they had drawn the string too tight, recited in 28 Geo. III. "that it had been found by experience *that great mischiefs [* 322] and inconveniences had arisen to persons interested in ships and to persons using commerce, from the 25 Geo. III., c. 44, and that it was expedient that other and more convenient provisions should be made for the regulating insurances on ships, &c., than those contained in the said Act," &c. Now we are bound to say that this second statute must receive the most liberal construction that the words will bear. From the language of the two statutes, as well as the consideration that we are construing a contract *uberrima fide*; viz., a policy of insurance, we must avoid bearing harder upon the plaintiffs than is absolutely necessary. Let us see, then, whether the plaintiffs do or do not come within any of the descriptions of persons in the last statute. These descriptions are four: the consignor and the consignee, the person receiving and the person giving the order. It is perfectly clear that the plaintiffs are not the consignors: but I am by no means prepared to say that they are not the consignees. It is true that the goods were originally consigned to another person, but the

case must be considered as it stood at different periods: though the Cudbear Company were clearly the consignees at first, it does not follow that they continued to be so. What is a consignee? A consignee is a person residing at the port of delivery, to whom the goods are to be delivered when they arrive there. Lund does not trust the Cudbear Company without securing himself: he therefore sends the bill of lading to the plaintiffs, who are his general agents, in order that he may be secure of being paid for his goods. Certainly if the Cudbear Company had received the goods, they would have been the consignees, but they refused to receive them; then who was entitled to receive them? It cannot be pretended that nobody had the right, and the captain could not keep them: then to whom could the right belong but to the persons who had the bill of lading and were the general agents of the consignor? From the moment that the Cudbear Company refused to have anything to do with the goods, the plaintiffs became the consignees. If this be so, there is no objection to the policy, and I am satisfied that I do not carry this construction too far when the justice of the case is with the plaintiffs. But there are two other characters mentioned in the statute. The next is the person who receives the order to insure. Let us see, therefore, whether these plaintiffs had not an order to make insurance. The goods were originally intended for the Cudbear Company; but they were sent, accompanied with a letter, [* 323] * which stated in the clearest terms that Lund intended that they should be insured. The Cudbear Company having refused to take the goods, could the plaintiffs, who were the general agents of Lund, could any man of sense read his letter, and doubt of his intentions? In giving his reasons he says that the season is so far advanced that he does not think it safe to send the goods without their being insured. The plaintiffs must therefore have been blind if they had not seen that it was his intention to have them insured. Then what was his interest? Why, that they should be insured. It is agreed that a general agent has a right to exercise his discretion for the benefit of his principal: he must act on the spur of the occasion, and if nothing else had passed, I have doubts whether the consignor would not have been liable to pay the premium. But the plaintiffs take the opportunity to inform the consignor of their having made the insurance, and he highly approves of their acts: *French v. Back-*

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house, and *French v. Foulston*, 5 Burr. 2727, which brings the case within the maxim that “*omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*” I am clear, therefore, that the plaintiffs were the persons who received the order to make this insurance within the description of the Act of Parliament. But there is still another character to be considered; the statute mentions, in the last place, the person who gives the order to make insurance. Now, in my opinion, it is impossible to state a case that comes more directly within the Act of Parliament than this. Who were the persons immediately concerned, who immediately employed the broker, who gave the immediate order for insurance, but the plaintiffs? It appearing, therefore, that they come within the words of the Act of Parliament, the case stands clear of all objections, and is in law, conscience, and justice with the plaintiffs. With respect to the second count, I hold that the plaintiffs had a clear right to insure to the amount of £300, for which they were interested in the goods. My Brother Shepherd considers *them* as standing without interest in the goods, because they had only a debt against Lund. I agree that a debt which has no reference to the article insured, and which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest. The case is not at all altered by the goods not having arrived. There is no more common transaction * in the city of London than to raise [* 324] money on the security of a bill of lading and policy: these plaintiffs, having advanced their money on that security, must, if the goods had arrived, have received £300 out of them; the goods being lost, the policy of insurance stands in the place of them, and the plaintiff is entitled to receive that sum under the policy. By my note it appears that the CHIEF JUSTICE, when this case was first moved, delivered a clear opinion in favour of the plaintiffs: on the whole, therefore, I think the case is most decidedly with them.

HEATH, J. — I am of the same opinion. But as my Brother BULLER has entered so fully into the case, I shall speak more shortly than I should otherwise have done. This statute was made to prevent unlawful gaming. It is therefore enacted that no persons shall recover under policies of insurance but those who have either an interest as principals, or have acted as agents. In

the first place, then, I think that the plaintiffs were clearly the consignees of the goods: for the bills of lading were sent to them, and they had a right to take possession. The statute also says that if the names of the consignor or consignees be not inserted, that of the person giving or receiving the order for the insurance shall be inserted. While the ship is in safety, where is the difference whether the agent insure without order, and the principal afterwards approve of the insurance, or first receive the order and then insure? On the second count, it is equally clear that the plaintiffs had an insurable interest. It is true that if the Cudbear Company had altered their minds and taken to the cargo, that the plaintiffs would have had no interest, but if they had a contingent and reasonable expectation of interest, it was sufficient to entitle them to insure, according to what was held in *Le Cras v. Hughes*, E. 22 Geo. III. B. R., Park on Insur. 269, viz., that a certain expectation of receiving property captured for the emolument of the captors, from the Crown, would give an insurable interest.

ROOKE, J. — I agree in opinion with my Brothers. I think that the plaintiffs may be considered as consignees of these goods, and I also think that they may be considered as having received orders from the principal to insure what they did, having been subsequently adopted by him. But there is one ground on which I have no doubt, namely, that the plaintiffs come within the last description of persons mentioned in the statute. They are the persons who gave the immediate order, in consequence of [* 325] which * the policy was effected. The Act of 28 Geo. III.

was made to remedy the inconveniences which were experienced under the 25 Geo. III., and therefore we are bound to give it a liberal construction. I think the plaintiffs clearly entitled.

Postea to the plaintiffs.

ENGLISH NOTES.

See, as further illustrations of the principle, *Crowley v. Cohen*, No. 6, p. 314, *post*, and *Carruthers v. Sheddon*, referred to in notes there.

The case of *Routh v. Thompson* (second action, 1811), 13 East, 274, 10 R. R. 545, affords a good illustration of the principle. After a proclamation by the King in Council to detain and bring into port all Danish vessels, a King's ship took a Danish vessel, and while the vessel was still in the possession of the captors, war was declared against Denmark, and an insurance effected. The ship having been lost by

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the perils of the sea, it had been held in a former action, in which it was stated in a case reserved that the insurance was on account of the captors, that they could not recover. For as the ship had been taken before a declaration of war, they had no claim under the Prize Acts, — the now obsolete Act of 45 Geo. III., c. 72, s. 3, having given a vested right to a captor subject to the determination of a Prize Court (see *Stirling v. Vaughan*, 1809, 11 East, 619, 11 R. R. 276), — and therefore no insurable interest. But in the second action, where it appeared that the insurance was made by orders of a person who had been appointed prize agent by the captors, and that the insurance had been adopted by an Order in Council as an insurance on behalf of the King, Lord ELLENBOROUGH held that the captors being His Majesty's officers having no interest in themselves, and the possession having been taken on behalf of the King, — as otherwise the act would have been mere piracy, — they must be presumed to have given the order on behalf of the King, and, the insurance having been afterwards ratified by the King, the plaintiffs were entitled to recover on behalf of the King accordingly.

The principal case was followed, and the principle of the rule perhaps extended in *Hagedorn v. Oliverson* (1814), 2 M. & S. 485, 15 R. R. 317. The plaintiff had effected an insurance on ship (*Fiesco*), as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain, &c. The declaration averred the interest to be in S., a Danish subject. It did not appear that S. had given any order for the policy to be effected, nor was there any evidence that the plaintiff was an agent for S. except the fact that the plaintiff besides effecting the insurance had procured a licence to legalise the voyage; and a letter from S. to the plaintiff, after the loss, in the following terms: "I may now, I hope, expect that you have effected a final settlement with the underwriters per *Fiesco*, and request you to lay out the amount for me in coffee." Scarlett, for the defendant, insisted that the principle of ratification did not apply unless the party who contracts for the benefit of another is his general agent, as was the case in *Wolff v. Horncastle*; and he observed that in *Lucena v. Craufurd* (No. 1, p. 151, *ante*), the Dutch Commissioners were general agents for the Crown, and so was the prize agent appointed by the captors in *Routh v. Thompson*. But the Court held that even on the assumption that S. would have been entitled to repudiate the contract, he had the right to elect to take the benefit of it, and was therefore interested; and, upon his adopting the policy though after the loss, the plaintiff had the right to recover for his benefit.

Where a mortgagee of a ship has insured her and has been paid

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more than the amount of his mortgage, it is a question of intention, which may be left to a jury, whether the insurance was intended to cover the interest of the mortgagor as well. *Irving v. Richardson* (1831), 2 B. & Ad. 193. The question arose out of a double insurance, and a claim by one of the insurers for repayment of a proportion. It was contended that the mortgagee as legal owner was entitled to payment up to the value of the ship. But it was held that under the Merchant Shipping Acts, mortgagor and mortgagee have separate interests; and the defendant could not retain the whole, unless he had intended to effect the insurance on behalf of the mortgagor as well. The jury found that he had not; and so gave a verdict for the plaintiff, which the Court maintained.

On the other hand where a mortgagor of a ship, by arrangement with the mortgagee, had insured the ship with the intention of covering the mortgagee's interest as well as his own, the mortgagee is entitled to the benefit of the insurance to the extent of his interest, and the underwriter cannot against that mortgagee claiming to the extent of this interest, avail himself of a defence which might have been available against the mortgagor. *Small v. United Kingdom Marine Mutual Insurance Association* (1897), 1897, 2 Q. B. 42, 66 L. J. Q. B. 412, 76 L. T. 326.

AMERICAN NOTES.

The principal case is cited in *Locke v. N. A. Ins. Co.*, 12 Massachusetts, 61.

That an agent has in any case an insurable interest to the extent of his lien is indicated by the American cases before cited.

That one may insure in his own name the property of another for the benefit of the owner without the latter's previous authority or sanction, and that it will inure to that party's benefit upon his subsequent adoption of it, even after loss, is substantiated by *Waring v. Ind. Fire Ins. Co.*, 45 New York, 606; 6 Am. Rep. 146; *Miltenberger v. Beacom*, 9 Penn. St. 198; *Durand v. Thouron*, 1 Porter (Alabama), 238; *Flemming v. Marine Ins. Co.*, 4 Wharton (Penn.), 59; *Finney v. Fairhaven Ins. Co.*, 5 Metcalf (Mass.), 192; *Marts v. Cumberland Mut. F. Ins. Co.*, 44 New Jersey Law, 478; *Smith v. Cash Ins. Co.* (Penn.), 1 Pittsburgh, 428.

A part-owner of a vessel has no right to insure in his own name for the rest of the owners. *Finney v. Fairhaven Ins. Co.*, 5 Metcalf (Mass.), 192; 38 Am. Dec. 397; *Blanchard v. Waite*, 28 Maine, 51; 48 Am. Dec. 474; *Knight v. Eureka F. & M. Ins. Co.*, 26 Ohio State, 664; 20 Am. Rep. 778. And parol evidence is inadmissible to show that he had authority, and agreed to insure for the others, and that the insurer knew it. *Finney v. Bedford Com. Ins. Co.*, 8 Metcalf (Mass.), 348; 41 Am. Dec. 515.

But a part-owner who has chartered the remaining portion may insure the whole. *Oliver v. Greene*, 3 Massachusetts, 133; 3 Am. Dec. 96. And insurance by one owner in his own name on account of ——— inures to the

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benefit of the other owners when he had agreed to insure their interest. *Burrows v. Turner*, 24 Wendell (N. Y.), 276; 35 Am. Dec. 622, and cases cited in note, 624. So where one owner insured "for the benefit of whom it may concern," his administrator recovered the whole amount. *Sleeper v. Union Ins. Co.*, 65 Maine, 385; 20 Am. Rep. 706. One owner insuring the whole may recover in his own right and also for the others as administrator of the other owners. *Finney v. Warren Ins. Co.*, 1 Metcalf (Mass.), 16; 35 Am. Dec. 343.

And a part-owner, in whose name a policy on the whole vessel is issued "for account of the owners," becomes a trustee for all and may sue for all in his own name. *Knight v. Eureka Ins. Co.*, *supra*.

And suit by the others is a sufficient ratification of an unauthorized insurance. *Blanchard v. Waite*, 28 Maine, 51; 48 Am. Dec. 474; *Finney v. Fairhaven Ins. Co.*, 5 Metcalf (Mass.), 192; 38 Am. Dec. 397; *Insurance Co. v. Chase*, 5 Wallace (U. S. Sup. Ct.), 514.

In *Turner v. Burrows*, 8 Wendell (N. Y.), 144, an action to recover insurance moneys received by the defendant on a policy "on account of ———," the CHANCELLOR observed: "There are some cases where it has been held that an insurance made by an agent of an owner, or other person having an interest, was good as against the underwriters, if the act was afterwards sanctioned by the principal, although the insurance was originally effected without authority (*Lucena v. Craufurd*, 1 Taunt. 325; *Roath v. Thompson*, 13 East's Rep. 274; *Hagedorn v. Oliverson*, 2 Maule & Sel. R. 485). In all these cases, however, it will be seen that the contest was between the owner or his agent on the one hand, and the underwriters on the other; and that they were decided upon the principle that a consent given to what has been done by one acting as an agent without authority, has as against a third party a retrospective operation. In this case, if the insurance was intended to be made for the benefit of both parties, although without authority on the part of Burrows, if the arrangement made by him had been sanctioned by Turner, there might have been a legal recovery against the underwriters for the benefit of both; but I apprehend the plaintiff had no right to consider Burrows as his agent as to one part of this business, and to disaffirm his acts as to the other.' See *Insurance Co. v. Smith*, 3 Wharton (Penn.), 527.

A charterer may insure the vessel in his own name for "owners, loss payable to" the charterer. *Murdock v. Franklin Ins. Co.*, 33 West Virginia, 407; 7 Lawyers' Rep. Annotated, 572, citing *Lucena v. Craufurd*.

But a ship's general agent, even acting under a power of attorney, authorizing him to sell, manage, direct, charter, and freight, has presumptively no lien or other insurable interest in the vessel for advances made in the course of his agency. *China M. Ins. Co. v. Ward*, 59 Federal Reporter, 712. Otherwise of a managing owner's similar expenditures. *Kinsman v. China M. Ins. Co.*, 49 *ibid.* 876. Such interest exists whenever it can be shown between injury to the thing insured and the loss to the party insuring: *McDonald v. Black's Adm'r*, 20 Ohio, 185; 55 Am. Dec. 448. See *Riggs v. Com. Ins. Co.*, 125 New York, 7; 10 Lawyers' Rep. Annotated, 684 (stockholder insuring corporate property); *Horsch v. Dwelling-House Ins. Co.*, 77 Wisconsin, 4; 8

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Lawyers' Rep. Annotated, 806 (husband buying lands in wife's name); *Essex Sav. Bk. v. Meriden F. Ins. Co.*, 57 Connecticut, 335 (mortgagor after foreclosure and during period for redemption); *Nussbaum v. Northern Ins. Co.*, 37 Federal Reporter, 524; 1 Lawyers' Rep. Annotated, 704 (pledgee); *Murdock v. Franklin Ins. Co.*, 33 West Virginia, 407; 7 Lawyers' Rep. Annotated, 572, citing the principal case as "high authority." A simple contract creditor has an insurable interest in a building belonging to the estate of his deceased debtor, which may be subjected to his debt because the personal property is insufficient to pay the debts of the deceased. *Creed v. Sun Fire Office*, 101 Alabama, 522; 23 Lawyers' Rep. Annotated, 177.

A turnpike company, voluntarily contributing to the construction of a public bridge, over which those using its road, as well as the general public, pass, but having no other interest therein, has no insurable interest in it. *Stambaugh v. Blake*, 15 Atl. Rep. 705.

One in possession of a house under an oral agreement that he shall have it as a home for life, and keep it insured and in repair, and pay the taxes, has an insurable interest in it. *Berry v. Am. C. Ins. Co.*, 132 New York, 49: "The principle upon which these cases all rest is that there is a possible liability arising out of the peril insured against, and that creates an insurable interest." "It is enough if he is so situated with reference to it that he would be liable to loss if it is destroyed, or injured by the peril insured against." "The test of insurable interest is whether an injury to the property or its destruction by the peril insured against would involve the assured in pecuniary loss." So of one who agrees, for a consideration, to take possession of a building, care for it, rent it, and keep it insured. *Cross v. National F. Ins. Co.*, *ibid.* 133.

As to the necessity of an interest existing at the time of the commencement of the risk, it is said, *obiter*, in *Henshaw v. Mut. S. Ins. Co.*, 2 Blatchford (U. S. Circ. Ct.), 102: "There is however strong color at least for the doctrine that the party intended to be insured will be protected, if he had an interest at the time of the loss, without any express stipulation to that effect, although he had no interest at the commencement of the risk (Hughes on Ins. 42; Duer on Ins. 49, sect. 31; *Sutherland v. Pratt*, 11 Mee. & W. 296; *Hancox v. Fishing Ins. Co.*, 3 Sumn. 132, 140, 142)." But in *Seamans v. Loring*, 1 Mason (U. S. Circ. Ct.), 141, a case of insurance on a vessel, STORY, J., said: "The assured must have a subsisting interest at the time when the policy, by its terms, would attach, otherwise it will be void for want of an insurable interest. Such an interest subsequently acquired would not aid them."

No. 4. — **M'Swiney v. Royal Exchange Assurance Co.**, 14 Q. B. 634. — Rule.

No. 4. — **M'SWINEY v. THE ROYAL EXCHANGE
ASSURANCE CO.**

THE ROYAL EXCHANGE ASSURANCE CO. v. M'SWINEY.

(Q. B. 1849 and EX. CH. 1850.)

No. 5. — **WILSON v. JONES.**

(EX. CH. 1867.)

RULE.

A PERSON having an interest in the nature of property, or by contract, in the subject matter of a commercial adventure may by apt language of description insure the expectant value or profits depending on the success of the adventure.

M'Swiney v. Royal Exchange Assurance Co.

14 Q. B. 634-646 (s. c. 18 L. J. Q. B. 193).

Insurable Interest. — Profit under Contract for Shipment. — Commencement of Risk. — Loss by Perils of the Sea.

Plaintiff in London contracted to buy of D. 6000 bags of rice, to arrive from Madras by the ship E. B. before the end of May: and he contracted with W. to sell him the same rice, to arrive as above, at an advanced price. Plaintiff then effected an insurance at and from Madras to London on profit on rice, loaden or to be loaden, and also upon the body, tackle, etc. of the ship E. B., beginning the adventure upon the goods from and immediately after the loading thereof aboard the said ship at Madras. The ordinary perils were insured against. Premium £2 10s. per cent. The rice was all ready to be shipped on board the E. B. and conveyed to London for plaintiff's vendors, and 1200 bags were actually on board, when, by perils of the sea, the ship was disabled, and prevented from performing the voyage, and the rice on board spoiled; and plaintiff's contracts both of purchase and sale became inoperative. In an action by plaintiff on the policy, for a total loss in respect of 4800 bags, the insurers having settled for the 1200: —

Held, by the Court of Queen's Bench: —

That the plaintiff's expected profit was an insurable interest, and well insured by this policy.

And that it was not necessary to the plaintiff's right of recovery that the 4800 bags should have been actually on board; the ship having been at Madras

No. 4. — *M'Swiney v. Royal Exchange Assurance Co.*, 14 Q. B. 634, 635.

ready to take in the cargo, and having been disabled from doing so by no cause but peril of the sea.

Held, by the Court of Exchequer Chamber, reversing the judgment in Q. B.:—

That the plaintiff's interest in profit was insurable: But

That it was not properly insured by a policy in this form, except as to the rice actually put on board.

And that, if the rice on shore could have been considered a subject-matter of the insurance under this policy, the loss in respect of such rice was not occasioned by peril of the sea, within the meaning of the policy, but was only consequential upon other loss occasioned by such peril.

Covenant. The declaration stated that, before the making of the policy after mentioned, viz. on 9th January, 1847, at London, the plaintiff agreed to buy of one John Drake, as and being the agent of certain persons carrying on business under the name of Drouhet Gardiner & Company (whose names are not otherwise known to plaintiff), and J. D., as and being such agent, then agreed to sell to plaintiff certain goods then supposed to have been shipped at Madras on board of, and expected to arrive by, a vessel called the *Edward Bilton*, from Madras, to wit, 6000 bags of rice at 19s. per cwt., to agree with certain samples, and [* 635] to arrive on or before the end of * May then next, guaranteed equal in quality to said samples or an allowance to be made: the ship to be at liberty to go to any port in Great Britain, &c. (Then followed the terms of the contract, as to mode of payment and allowances, which it is unnecessary to set forth.) And the said contract for purchase, &c. having been so made afterwards, to wit, on 16th January, A. D. 1847, plaintiff agreed to sell to certain persons, to wit, certain persons carrying on trade and business under the name and style of Messrs. J. & C. Woodhouse (names not otherwise known to plaintiff), who then agreed to buy of plaintiff the said goods, to wit, the said 6000 bags of rice then still supposed to have been shipped, and expected to arrive, as aforesaid, at the price of 20s. 6d. per cwt., and upon the like terms and conditions in all respects, except the amount of the price thereof, as were agreed upon between the plaintiff and the said John Drake, as first aforesaid. And plaintiff thereupon then, and from thence, until and at the time of the making of the policy of insurance hereinafter mentioned, had just reason to expect and did expect that he would, by reason and means of the premises, and of the arrival of the said rice as aforesaid, and the

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performance of the said contracts, make a profit (to wit) to the amount of £675, on and in respect of the said rice. And thereupon, after the making of the said contracts, and whilst the said rice was still supposed to have been shipped, and expected to arrive, as aforesaid, to wit, on 18th January, A. D. 1847, a certain policy of insurance was, at the instance of the plaintiff, and in consideration of certain premiums, &c., made by and sealed with the common seal of the defendants * (profert): [* 636] By which policy of insurance the plaintiff, as well in his own name as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, &c., did make assurance upon the expected profit on the said rice, to wit, the profit aforesaid, and cause himself and them and every of them to be assured by the defendants, lost or not lost, in respect of the same, at and from Madras to London: which said policy was and is of the tenor following, that is to say:—

The declaration then set out the policy, by which “ E. M'Swiney, as well in *his* own name,” as in those of all to whom it might appertain, made assurance, “ lost or not lost, at and from ¹*Madras to London, with leave to touch at all ports and places on either side of and at the Cape of Good Hope for all purposes, being on profit on rice*, upon any kind of goods and merchandise whatsoever loaden or to be loaden; and also upon the body, tackle,” &c. of and in the ship “ called the *Edward Bilton*, burthen,” &c., whereof is master, &c.; “ beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof aboard the said ship *at Madras*; and upon the said ship, &c.; and so shall continue and endure during her abode there upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at London: upon the said ship, &c., until she hath there moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely *landed. And it shall be lawful,” [* 637] &c.: liberty for the ship to touch and stay, &c.; valuation clause (not filled up): perils insured against to be “ of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests,

¹ The words in Italics were written on blanks of the printed form.

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restraints," &c., of all kings, princes, &c., "barratry of the master and mariners; and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof:" liberty to the assured to sue, labour, &c., about the defence, recovery, &c.; policy to be of as much force as the surest policy, &c. And the insurers confessed themselves paid "the consideration due unto them for this assurance by *the assured*, at and after the rate of *two pounds ten shillings* per cent." Sum insured, "six hundred pounds:" clause as to average. The declaration then averred that the said corporation thereupon became insurers to the plaintiff for the said sum of £600 upon and in respect of the said expected profits on the said rice, so agreed to be bought and sold as aforesaid, against the risks aforesaid.

It was then averred that, heretofore and before the damage and loss after mentioned, to wit, on 20th October, A. D. 1846, the said ship was at Madras aforesaid, and was then ready and about to take the said rice, to wit, the said 6000 bags thereof, on the voyage in the said policy mentioned to London aforesaid; and the said rice, to wit, the said 6000 bags thereof, being of good quality, to wit, equal to the said samples, was then ready and about to be taken in the said ship on the said voyage in the said policy mentioned, and consigned to the said persons who agreed to [* 638] sell the same to the plaintiff as *aforesaid: and a part, to wit, 1200 bags, of the said rice was then shipped and loaded on board the said ship for the purpose of being carried on the said voyage to London aforesaid; and the residue of the said rice, to wit, 4800 bags thereof, were then at Madras aforesaid ready and about to be loaded on board the said ship for the purpose of being carried on the said voyage to London aforesaid; and the said rice, to wit, the said 6000 bags thereof, were then ready and about to be, and would then have been, carried to London in the said ship, and the said profits made by the plaintiff in respect thereof, but for the damage and loss hereinafter mentioned. And the said ship then, and whilst she was at Madras aforesaid ready and about to take on board the rest of the said rice and proceed therewith on the said voyage, was by the perils of the seas and by stormy and tempestuous weather greatly damaged and injured, and rendered incapable of taking, and by reason thereof did not take, the said rice or any part thereof on the said voyage to London, &c.

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so as to enable plaintiff to make the said profit, or any profit, thereof; and the said part of the said rice so on board of the said ship was then by reason of the said perils spoilt and lost, so that no profit could be or was made of the same: and the said residue of the said rice was then by the said perils prevented from being shipped and loaded on board the said ship and carried on the said voyage. Averment that, by reason of the perils aforesaid, the same being perils insured against by the said policy, the said vessel was wholly prevented from arriving, and did not arrive, with the said rice or any part thereof, on or before the end of May, 1847, which had elapsed before this suit, or at all, so as that * plaintiff could make the said profit or any profit of [*639] the same; and the said profit on the said rice so insured, &c. during the said risk, &c., then became and was, by perils insured against by the said policy, to wit, by the said perils of the sea, &c., wholly lost to the plaintiff, and plaintiff was thereby damnified to a large amount, to wit, £675. Averments that plaintiff, at the time of insurance, and during the period of risk, was interested in the profits insured, to wit, to the whole amount insured; that he performed all things on his part, &c., and that the defendants had notice, &c., and were requested by him to pay, &c.

Plea 1. By statute (11 Geo. I., c. 30, s. 43): except as to the said part of the rice alleged to have been loaded on board the said ship, and the said expected profit of the plaintiff thereon, that defendants have not broken the covenants, &c.: conclusion to the country. Issue thereon. 2. As to the causes of action excepted, payment of £102 into Court, which the plaintiff accepted.

On the trial, before Lord DENMAN, Ch. J., at the sittings in London, after Trinity Term, 1848, a special verdict was found, which was in substance as follows:—

On the 9th of January, A. D. 1847, the plaintiff purchased of Messrs. Drouhet Gardiner & Co., through their agent, Mr. John Drake, 6000 bags of rice, then supposed to have been shipped at Madras on board the *Edward Bilton*, hereinafter mentioned, and expected to arrive at London before the end of May, 1847. The purchase was effected by bought and sold notes, in the usual way, signed by Messrs. Kemble & Trewer, the brokers of the parties, and which stated that the rice was to arrive on or before the end of May. On the 16th of January, 1847, the plaintiff sold to

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Messrs. Woodhouse the said 6000 bags of rice then still expected to arrive as before mentioned, at an advance of price of 1s. 6d. per cwt., but upon the same terms in all other respects as those upon which the plaintiff had himself bought them. That sale was also effected by bought and sold notes, signed by the brokers of the parties in the usual way. Messrs. Woodhouse, the purchasers, have continued solvent. The profit upon the said transaction, in case the said rice had arrived by the said vessel before the end of May, 1847, would have been £675. On the 18th of January, 1847, after the purchase and sale of the rice, and whilst it was still expected to arrive by the said vessel, the plaintiff applied to the defendants to insure profit on rice, meaning the profit arising on the transaction comprised in the bought note of the first contract and the sold note of the second contract, and the policy in the declaration mentioned was thereupon effected by the plaintiff with the defendants. On the 18th of October, 1846, the *Edward Bilton* arrived, and was at Madras for the purpose of taking the 6000 bags of rice in question from Madras to London, for which purpose she had been previously chartered by the plaintiff's vendors. The whole of the 6000 bags of rice in question was then at Madras, ready and about to be shipped on board the said vessel to be carried from Madras to London, for the plaintiff's vendors. On the 21st of October the vessel was blown out to sea by a gale of wind, and returned to Madras on the 26th of October. 1200 bags of the rice only were then loaded on board the said vessel, and the remaining 4800 bags were ready and about to be shipped on board of her, when, on the 24th of November, another violent gale came on, which drove the said vessel out of Madras roads to sea, and there dismasted and otherwise damaged her, and spoilt the said 1200 bags of rice. Afterwards she put back to Madras, where she again arrived on the 27th of November, and after having discharged the 1200 bags of rice, which were so damaged by the sea that they were obliged to be sold on the spot, and never came to London, she was found so injured by the said gale as to be obliged to proceed to Calcutta for repair, and was wholly disabled from taking on board the remaining 4800 bags of the rice in question, and from proceeding from Madras to London on the voyage mentioned in the policy, and which she would have done, and would, in ordinary course, have arrived in London before the end of the said month of May,

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whereby the contracts aforesaid would have been performed and the said profits realized thereon by the plaintiff, but for the injuries and damage aforesaid. She was under repair at Calcutta until the 27th of May, 1847, and sailed thence on that day for London direct, with a cargo, and arrived in London on the 24th of November, 1847, without any of the said rice on board. In consequence of the said damage to the *Edward Bilton*, the 4800 bags never were loaded on board of her, but were afterwards sent to London by another vessel, the *Mary Nixon*, but did not arrive until some time in the month of June, 1847; both the said contracts, consequently, became inoperative, and the said profit was wholly lost by the plaintiff. The defendants, before this action, had notice of the premises, and were requested by the plaintiff to indemnify them against the said loss, but declined to do so on the ground that they were only liable to make good to him the loss of the said profit to arise in respect of the quantity of the rice in question actually shipped on board the *Edward Bilton*, but not in respect of the residue of the said rice, which was not actually loaded on board the vessel. The question for the decision of the Court was, whether the defendants were or were not liable, under the circumstances, to pay to the plaintiff the claim made by him in respect of the expected profits on the rice that was not in fact shipped, as well as in respect of what was actually shipped.

The case was argued on the special verdict in Hilary Term, 1849, by Martin, for the plaintiff, and Sir F. Thesiger for the defendants.

Judgment was delivered in Hilary Vacation (Feb. 24, 1849) by —

Lord DENMAN, Ch. J. — This was an insurance on the profits [643] to arise upon the sale by the plaintiff of 6000 bags of rice, in case they had arrived by the *Edward Bilton*. The plaintiff had purchased the rice, which was at the time supposed to have been shipped on board the *Edward Bilton*, on the 9th of January, 1847; and bought and sold notes were regularly delivered. On the 16th of January the plaintiff sold the rice at an advance of 1s. 6d. per cwt., and bought and sold notes were in like manner regularly delivered. * The rice was expected to arrive by [* 644] the *Edward Bilton* in May, 1847. On the 18th of January the plaintiff insured the profits arising upon the sale by him. The policy was “at and from Madras to London, on profit on rice,

beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof aboard the said ship at Madras." On the 26th of October, 1846, the *Edward Bilton* was at Madras, ready to take the 6000 bags of rice, which were also there lying ready to be shipped on board of her, she having been chartered for the purpose. 1200 bags had been loaded on board, and the rest were about to be loaded at Madras, when the ship was blown out to sea, and so much damaged that the 1200 bags were spoilt and obliged afterwards to be relanded; and she was unable to bring them or the remainder to England.

Since the case of *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 269, 3 Bos. & P. 75 (p. 151, *ante*), there is no doubt that there may be an insurance upon profits; but it was contended on behalf of the defendants, that to give an insurable interest the goods out of which the profits were to arise must have been on board the ship; and that this case was within the principle of the decisions in *Stockdale v. Dunlop*, 6 M. & W. 224, 9 L. J. (N. S.) Ex. 83, and *Knox v. Wood*, 1 Camp. 543 (10 R. R. 746). Both those cases are, however, clearly distinguishable from the present.

In *Stockdale v. Dunlop* there was no binding contract for the sale to the plaintiffs of the goods from which the profits were to arise: they had, as observed by the Court, no legal interest whatever in the subject-matter of the insurance; there was merely an expectation of possession on the part of the plaintiffs, [* 645] founded * on a verbal promise of the vendors, which was not binding upon them; and therefore there was no insurable interest. In the present case, the plaintiff had purchased the rice by a valid and binding contract, and the profit was fixed and ascertained by another valid and binding contract entered into by him with his vendees. In the case of *Knox v. Wood* the vessel was lost upon her outward voyage; and no cargo was ready for her homeward voyage, upon which the profits were to arise, or even contracted for; so that, as Lord ELLENBOROUGH observed, the interest of the assured was the expectation of an expectation, which was not an insurable interest.

In the present case, the ship was actually at Madras, where the goods were lying ready to be put on board in pursuance of a valid contract, and part actually was on board at the time of the loss. It appears to us, that the case in principle falls within those of *Deraux v. J'Anson*, 5 Bing. N. C. 519, 8 L. J. (N. S.) C. P.

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284, *Warre v. Miller*, 4 B. & C. 538 (28 R. R. 382), and *Flint v. Le Mesurier*, reported in *Park on Insurance*, p. 563; and that where there is a legal certainty that profit will be made if goods arrive, and that the goods are ready to be shipped under a valid contract, there is an insurable interest; and that if the loss arises from a peril insured against, such as the perils of the sea, the underwriters are responsible.

The risk of loss of profits attached when the vessel was at Madras, ready to take in her cargo, and having actually begun to take it in; and the loss occurred by the ship being blown off and sustaining too much damage to take in all the cargo, which was a peril of the sea.

* Upon the whole, we are of opinion that the plaintiff is [* 646] entitled to our judgment.

Judgment for the plaintiff.

(IN THE EXCHEQUER CHAMBER.)

(Error from Queen's Bench.)

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14 Q. B. 646-663 (s. c. 19 L. J. Q. B. 222; 14 Jur. 998).

Judgment having been signed in this case for the plaintiff below, the defendants below brought error in the Exchequer Chamber, assigning for errors that it appears by the record that defendants have broken their covenants so far as regards the matters pleaded to in the first plea, and that judgment is given for the plaintiff, whereas judgment ought to have been given for the defendants. Joinder. The case was argued on the writ of error in Michaelmas Vacation (November 27th), 1849, before MAULE, CRESSWELL, WILLIAMS, and TALFOURD, JJ., and PARKE, ALDERSON, ROLFE, and PLATT, Bs.

Sir F. Thesiger for the plaintiffs in error (defendants below). The plaintiff below could not have an insurable interest in the expected profits without having an insurable interest in the goods; and in those he could have no insurable interest till they were put on board. Until then neither goods nor profits could be the subject of perils of the seas. The judgment of the Court * of [* 647] Queen's Bench has proceeded too far on a supposed analogy to the case of freight. The subjects of insurance are ship and goods, to which freight and profits are incident. There can be no insurable interest in freight without ownership of the vessel, nor

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in profits without an actual interest in the goods, the corpus on which the profits are to arise. In *Barclay v. Cousins*, 2 East, 544, 547 (6 R. R. 505), where profits of a cargo were held insurable, LAWRENCE, J. (delivering the judgment of the Court), treated them as incident to the goods insured. After describing the protection by insurance as embracing generally "those losses and disadvantages which, but for the perils insured against, the assured would not suffer," he proceeds: "In every maritime adventure, the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such a case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain, without more risk than the capital itself would be liable to: and if, when the capital is subject to the risks of maritime commerce, it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risk?" Lord ELLENBOROUGH asked, in *Eyre v. Glover*, 16 East, 218, 3 Camp. 276 (13 R. R. 801), "Are profits anything more than an excrescence upon the value of the goods [* 648] beyond the prime cost?" * Reference was made in the Court below to *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 269, 302 (p. 151, *ante*), where LAWRENCE, J. said: "Interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring: and where a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest devisable" (derivable) "from it may be very different: of the first the price is generally the measure, but by interest in a thing every

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benefit and advantage arising out of or depending on such thing may be considered as being comprehended." But these words must be understood with reference to the subject-matter of decision in that case, namely, the interest of the Commissioners for sale of Dutch property under Statute 35 Geo. III., c. 80, s. 21, in Dutch ships actually seized under orders of the British government, and insured by the Commissioners afterwards. If the language of LAWRENCE, J. be supposed to mean that for the purpose of insurance it is not necessary to have an actual interest in the subject-matter, it is directly at variance * with *Stockdale* [* 649] v. *Dunlop*, 6 M. & W. 224, 9 L. J. Ex. 83, where the Court of Exchequer held that the plaintiffs had no insurable interest in the profits of an expected cargo which they had agreed to purchase, the contract not being a legally binding one. The accessory cannot be more protected than the principal; and by the terms of this policy the goods were insured only "from the loading thereof aboard." It is true that in *Flint v. Flemyng*, 1 B. & Ad. 45, the plaintiff recovered for the loss of freight on goods which had not yet been shipped; and that decision was followed up in *Devaux v. J'Anson*, 5 Bing. N. C. 519, 8 L. J. (N. S.) C. P. 284: but in these cases the freight was lost by loss of the ship; the ship was the principal; and, that being destroyed, the freight never could be earned. Here the principal, the 4800 bags of rice, never was destroyed; there was merely a delay in its arrival. As PATTERSON, J. observed on the argument below, the assured is seeking to engraft on the insurance a guarantee that the goods shall arrive within a certain time. The loss in question does not arise from any peril insured against. Supposing even that the goods had been shipped, and the vessel had sailed and been obliged to put back, and by the consequent delay a market for the cargo had been lost, the goods themselves being entirely uninjured: that would not have been a loss within the policy. The judgments of this Court in *Anderson v. Wallis*, 2 M. & S. 240 (14 R. R. 642), and *Everth v. Smith*, 2 M. & S. 278 (15 R. R. 246), are clear on this point, as to goods and freight; and there can be no different rule as to profits.¹ It * cannot be contended [* 650]

¹ PATTERSON, J. observed on the argument below: "If Drouhet & Co. had insured the rice, they could not have recovered for the 4800 bags, because of their arrival. Supposing they had also

insured the profits in the language of the present policy, could they have recovered for them? If so, the profits would seem not to be a mere excrescence."

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that there is in this case any insurance, virtual or otherwise, upon the ship; the omission to strike out some words in the printed form may give rise to this suggestion; but the declaration states the insurance to be on the expected profit upon rice.

Martin, *contra*. — First: the policy was in reality an undertaking that the ship should not be prevented from arriving with the goods by an injury for which the shipowner or the owner of the goods might have recovered: and this meets the observation of PATTERSON, J., referred to on the other side. Secondly: the loss was an entire destruction of that which was the subject-matter of insurance.

What that subject-matter was, is the real dispute between the parties. The insurance was upon the profits of a contract. M'Swiney had agreed to purchase rice of Drouhet & Co.; but nothing actually passed to him by that agreement: something remained to be done before the property in the rice vested in him; it was to arrive and be weighed out. Then M'Swiney sells to Messrs. Woodhouse; and he insures the profit to arise from the sub-contract. The interest so insured is not an excrescence from the goods. That expression applies to the ordinary case where a man has actually bought goods and expects to get an advanced price for them at the port of discharge. Here the declaration alleges that the plaintiff at the time of effecting the policy had reason to expect, and did expect, that he would, "by [* 651] * reason and means of the premises, and of the arrival of the said rice as aforesaid, and the performance of the said contracts, make a profit," &c. If that profit was lost by a peril of the sea operating on the ship and part of the goods at Madras, the policy attached. It is not correct to say generally that this is setting up a guarantee that the ship should arrive in London by the end of May. The liability of the insurers depended on the ship being injured by a peril insured against, and thereby prevented from arriving. [CRESSWELL, J. Suppose the ship had been stranded but not injured, and a delay had resulted.] It is not necessary to say whether on a delay caused by such an accident, or by winds, the policy would attach. But it would if the delay were occasioned by the happening of a peril insured against. [PARKE, B. If, in consequence of such a peril, the ship had been delayed, but arrived on the 1st of June, would that have been a loss?] That is not the present case. Ordinarily the subjects of

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marine insurance are ship, goods, and freight; but an insurance may be on something which is neither. Nothing creates a limit in this respect but the statute 19 Geo. II., c. 37. The policy here shows expressly that the insurance contemplated was upon "profit on rice:" that is a legal insurance and analogous to insurances of freight ("the benefit derived from the employment of the ship": *Flint v. Flemyng*, 1 B. & Ad. 48); or of commission, which is the interest a man has in the sale of goods arriving at their port and realizing a profit by his exertion, though he has no interest in the goods themselves. "Commissions, as to their insurability, stand on the * same ground as profits; and, as we [* 652] have already seen, are clearly established in English law, to be lawful subjects of insurance." But "the assured must show that, at the time of the loss, the goods, out of the sale of which the profits or commissions were expected to arise, were either actually on board, or ready or contracted to be put on board, so that nothing but the loss intervened between the assured and his realizing such profits or receiving such commission:" 1 Arnould on Insurance, 241; where *Knox v. Wood*, 2 Park Ins. 564, 1 Camp. 543 (10 R. R. 746), is cited. The language of LAWRENCE, J. in *Barclay v. Cousins*, 2 East, 547 (6 R. R. 505), cited on the other side, and in 1 Arn. Ins. 204, shows that the interest in question is one of those which may legitimately be insured.

Stockdale v. Dunlop, 6 M. & W. 224, 9 L. J. Ex. 83, is no authority against the plaintiff below. There the contract on which the interest depended was one which could not be enforced; it was, as PARKE, B. said, "an engagement of honour merely." The same learned Judge says there: "I admit that profits may be insured, but that is on the ground that they form an additional part of the value of the goods, in which the party has already an interest. Thus the owner of goods on board a vessel may insure the profits to arise from them. So may a consignee, or a factor in respect of his commission. So may captors, because they have a lawful possession, coupled with a well-founded expectation that their claim to retain the goods will be allowed. So may the owners of slaves, or a captain in respect of his commission. In these cases there is either an absolute or a special property in possession." — [PARKE, B. I was *contemplating [* 653] the case of goods actually on board.] The judgment proceeds: "There the profits are insured as an additional value upon

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the goods, in which the insurer had a present interest." That would not apply to the case of a factor. "Here, however, the assured are not interested at the time of the goods being put on board, but only upon their arrival." In the present case there was an actual interest when the goods were put on board, by a subsisting and valid contract. It was an "interest derivable" from a thing, as distinguished from "the property of a thing" by LAWRENCE, J. in *Lucca v. Craufurd*, 2 Bos. & P. (N. R.) (p. 151, ante).

If it be asked when this policy attached, the answer is, when the goods were ready for shipment at Madras, and the vessel ready to receive them. The effective words, as to the commencement of the risk, are "at and from." In *Montgomery v. Eggington*, 3 T. R. 362 (1 R. R. 718), the insurance was on freight valued at £1500; £500 worth was on board, and goods to the remaining amount ready to be shipped, when the vessel was driven from her moorings and lost; and the assured recovered in respect of the whole. In 1 Arn. Ins. 470, the result of that and other cases is stated to be: "That where a full cargo has been contracted for, and is ready to be shipped on board at the time of the loss, and the ship, being otherwise in a condition to receive the cargo, is only prevented from doing so by the intervention of the perils insured against, the policy on freight attaches, and the underwriters are liable for the loss of the whole freight which would have been earned on the voyage, even though no part of [* 654] the cargo has ever been shipped on board at all." * This applies equally to the interest insured here. Unless the words "at and from" have the effect here contended for, there is no difference between an insurance on freight or on profits and an insurance on goods, in which case the risk begins from the loading on board. [CRESWELL, J. The contract with Messrs. Woodhouse was for goods "to arrive on or before," &c. According to *Lovatt v. Hamilton*, 5 M. & W. 639, it was no binding contract for goods which did not so arrive.] *Johnson v. Macdonald*, 9 M. & W. 600 (cited, with the preceding and other decisions, in Smith's Mercantile Law, 469, note (f), 4th ed.), was a similar case. The contingency by which the plaintiffs in these cases were defeated is that which the present policy is intended to provide against. In 2 Park Ins. 564 (Hildyard's ed.) it is said that "an open policy on profits is good, the assured proving an interest in the cargo;" and

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King v. Glover, 2 Bos. & P. (N. R.), 206 (9 R. R. 638, p. 336, *post*), is cited, where "in the Common Pleas, after much deliberation, all the Judges of that Court were of opinion that an African captain, who, besides his wages, was entitled for his trouble and attention in purchasing slaves on the coast of Africa, and selling and disposing of them in the West Indies, to so much per cent, and other privileges, had a good insurable interest in this remuneration." There the insurance was "at and from" the coast of Africa, and would have attached if, when the slaves were ready to be taken on board, the ship had been blown out to sea and the voyage lost. In that and similar cases, "there was something of certainty in the profits or commissions which the assured expected:" but, "where not only the profits are an *expectation, but the obtaining a cargo, out of which the commission is to arise, is also an expectation, such an insurance cannot be supported without entirely destroying the intention of the Stat. 19 Geo. II., c. 37:" 2 Park Ins. 564. The present insurance, tried by this test, sustains the action. *Devaux v. J Anson*, 5 Bing. N. C. 519, 8 L. J. (N. S.) C. P. 284, goes the whole length required by the plaintiff below. [MAULE, J. The goods there were the plaintiff's own; and the decision was that, under an insurance upon freight, he might recover the profits expected from carrying his own goods in his own ship: a very old point. PARKE, B. It was an insurance of the ship's earnings.] The insurance was against loss by injury either to the ship or goods: if either, in such a case, received injury by which loss accrued, the safety of the other would be no answer. [CRESSWELL, J. According to your argument you do not want the second contract of sale, if you can show that a profit would in some way have been made by the goods.] There is nothing unreasonable or illegal in a contract to be indemnified against loss that may accrue, either by the goods being altogether prevented from going, or by a part being damaged so that a contract in respect of the whole cannot be fulfilled: and, if the claim arises, the only question is whether the loss happened by a peril insured against. [PARKE, B. It is strange if the underwriters have insured the arrival by a certain day at the ordinary premium.] It is enough if the record shows that the voyage insured was never performed, and that by reason of a peril insured against. It lies upon the underwriters to prove that, having insured *against a particular peril, [*656] and that having happened, they are not liable.

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Then the policy in this case has attached, the subject-matter of insurance being totally destroyed. The profit was an undivided profit, depending upon the arrival of all the rice. Part not arriving, the whole benefit was lost; and that by a peril insured against. According to *Lovatt v. Hamilton*, 5 M. & W. 639, the plaintiff could not obtain 6000 bags, and he could not compel his vendees to accept less. [PARKE, B. Do you say that the insured profit would have been lost if one bag had sustained sea-damage?] In such an extreme case a jury would not find for the plaintiff. But if there were a real and substantial loss of quantity the profit would be gone. [PARKE, B. If the loss of ten bags would have that result, ought not the premium to be very high?] It was. [MAULE, J. If you had shown the agent of the Company a contract such as you state this policy to be, he would not have taken it at 2½ per cent.] The question comes ultimately to be, what was insured. [PARKE, B. And whether the policy has attached to that. MAULE, J. By perils of the sea.]

Sir F. Thesiger, in reply. There was, no doubt, some interest in the goods and possible profits, which might have been insured by a suitable policy. The insurance is simply of "profit on rice." It is contended that this means the profit of certain contracts respecting rice; but that is not so. If the party insuring had

stated to the underwriters that he wished to insure the [*657] arrival of 6000 bags of rice in London by the *1st of

May, the case would have been different. But the profit, as mentioned here, is part of the value of such a quantity of rice. [PARKE, B. It is an additional insurance by the owner on his own property. MAULE, J. Of the price at the port of discharge, after deducting the cost on board.] Such an insurance must be not on profits in the abstract, but on profits annexed to something; that is, to some certain goods. Then the risk upon such profits "at and from Madras" must commence when such certain goods are laden on board at Madras. *Horney v. Lushington*, 15 East, 46, 3 Camp. 85 (13 R. R. 759) decides that this is the time at which the policy on goods must attach. The case of commission differs from this; for, if the ship is lost, the commission may still be earned by sending on the goods in some other way. It is true that, in the case of freight, the assured may recover if either the ship or the goods be lost, the freight depending on the existence of both. But here a term is introduced independent of the mere

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safety of either ship or goods; namely, that the goods, and each and every part of them, shall arrive by such a time that profits may accrue under a contract. [ALDERSON, B. It is an insurance of the capacity to perform a contract.] Underwriters may enter into such an engagement; but they should have specific notice that they are doing so. Again, the present subject of insurance, as represented on the other side, is one on which perils of the sea, as the term is commonly understood, cannot operate. [ALDERSON, B. Would a calm be a peril of the sea for this purpose?] The defendants in error must contend so. In the case of freight, a loss by destruction of the vessel is a total loss within the policy, though the goods *are not on board: but there [* 658] the peril insured against is a peril to ship or goods; and the destruction of either takes away the possibility of earning freight. In this case of insurance on profits, the perils of the sea, if they operate at all, must operate upon the tangible subject goods, and goods actually on board. If the *Edward Bilton* had been totally lost before any rice was on board, but the rice had been sent by another ship, and had arrived in time and been accepted, there would have been no loss by perils of the sea, within the meaning of this insurance. The loss which has happened is not a loss by perils insured against, but by retardation of the voyage. No direct answer has been given to the question whether, if the voyage had been delayed one day beyond the end of May, or if one or two bags of rice only had been damaged, there would have been a loss within the meaning of the policy. This is, in effect, not an insurance upon profits in the sense ascribed to the word on the other side, but on the arrival of the ship in a given time, and the ability of the assured to perform his contract.

Willes (with Martin) suggested that the declaration expressly averred that the plaintiff "did make assurance upon the expected profits on the said rice," and the plea admitted this. [CRESSWELL, J. There is no admission: the plea is not the general issue, by statute. PARKE, B. It puts in issue everything.] Stat. 11 Geo. I., c. 30, s. 43, gives the Company power to plead "that they have not broke the covenant;" but it does not give any specific operation to the plea. [PLATT, B. Is not the effect of such an enactment, that the plea puts in issue everything?]

Cur. adv. vult.

No. 4. — The Royal Exchange Assurance Co. v. M'Swiney, 14 Q. B. 658-660.

The judgment of the Court (PARKE, B., ALDERSON, B., MAULE, J., CRESSWELL, J., PLATT, B., WILLIAMS, J., and TALFOURD, J.) was now delivered by —

[* 659] * PARKE, B. This case was argued before my Brothers ALDERSON, MAULE, ROLFE, CRESSWELL, PLATT, WILLIAMS, TALFOURD, and myself, at the last Sittings. The action is on a policy of insurance of the Royal Exchange Assurance Company. The declaration is out of the usual form. [The learned Judge then stated the pleadings and the substance of the special verdict.]

Upon the special verdict the Court of Queen's Bench gave judgment in favour of the plaintiff. On the argument before us it is contended that this judgment was erroneous. And we think that it was.

The first question discussed was, whether the plaintiff had an insurable interest in profit on the rice. Under the circumstances stated in the special verdict, we feel no doubt that he had; he had entered into a binding contract with Drouhet & Co., by virtue of which he would have had a right to 6000 bags of rice delivered to him in England on the safe determination of the voyage [* 660] of the *Edward Bilton* to England, with the * whole of that quantity of rice on board, before the end of May; and he had made another contract to sell the rice in these events, by which contract he had secured a profit of 1s. 6d. per cwt. We have no doubt that the plaintiff might have recovered, in the events which have happened, for a total loss if he had been insured by a policy properly adapted to the case, and so drawn as to cover his special interest from the time that the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profits, not merely by the loss of all the rice by perils of the sea, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated.

If such an assurance had been made on this peculiar interest against all these events, it is obvious that the underwriters would have required a much larger premium for insuring so complicated a risk than for an ordinary insurance by an owner on goods, or profits on goods, which would be liable to loss only by perils of the sea, or other accidents happening to the goods themselves.

But the question in this case arises on the policy declared upon,

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which is in most respects in the ordinary form, attaching the risk to the ship in the port, and to the goods from the loading on board. And the decision of that question depends upon the true construction of the policy alone; the facts found by the special verdict not affording any ground for putting a different construction upon it than that which its words require. It is probable that the plaintiff meant to insure his *special interest, [* 661] which was defeasible altogether on the happening of any one of four contingencies, the loss of the ship, or of the whole of the rice, or of part of the rice, or the delay of the voyage; and to insure against all of these contingencies happening by the perils of the sea or the other losses mentioned in the policy. Perhaps, also, he may have meant the policy to attach to goods on shore; but that is less probable, as he supposed the rice to be on board. The facts found do not enable us to say that the defendants meant to insure that interest, and against all those contingencies if that circumstance would make any difference; for it is not found that they knew the nature of the interest at the time of the effecting of the policy. The true question is, What is the meaning of the words in the policy itself?

Upon the face of the policy, giving full effect to the written part of it, we think that the plaintiff is to be considered in the same situation, as to the liability, as if he had insured the ordinary profits of a parcel of rice shipped on board the particular vessel, that is, the additional value which it was expected to acquire at the termination of the voyage, and against the losses specified. If so, we think it clear that the policy attached only to such rice as was actually on board. The adventure begins on the said goods from and immediately after the loading on board; and we think the insurance on the profit, or the additional value of the goods, cannot begin at a different time; and, further, that the losses insured against by this policy are only the losses by perils of the sea, directly affecting the goods, and, consequently, the profit on the goods.

We do not mean to say that the special interest * which the plaintiff had was not a "profit on rice," nor [* 662] that it was not insured against certain risks by the policy in certain events. It is not necessary for the defendants to contend that there was a false description of the subject of the policy, so that the underwriters were not bound thereby to indemnify the

plaintiff against some losses happening to it. We do not say the policy was void altogether, and the defendants not bound by it. Indeed, we think the defendants must be taken to have insured those insurable profits in the rice, which the plaintiff had, answering the description in the policy; and he is not stated to have had any other than that in question: but we are of opinion that according to the terms of that policy it attached only to profits arising from goods *actually put on board*, and indemnifies only against loss or damage to those goods, just as if ordinary profits of goods belonging to the owner of them had been insured thereby. The defendants, therefore, were not liable on the policy for the profit on rice not on board.

But it is not necessary for us to decide even this point; for, if the policy had attached to the profit of rice on shore, the defendants would certainly not have been liable for losses by perils of the seas, which did not *directly* affect them, but only other rice comprised in the same contract, the loss of which caused the loss of all the profit, by reason of the special nature of that contract, which made the profit to depend on the safe arrival of the *whole* of the rice on board a *particular* vessel and in a *certain time*. Who could suppose under such a policy as this that the defendants were to pay a total loss, if perils of the seas caused a loss of the ship, or of any part of the rice, or a retardation of the

[* 663] *voyage? We think it clear that the defendants were not bound to indemnify against such events entirely collateral to those on which ordinary profit on goods depends; so that, according to the true construction of the policy, it attached to the profit of no goods, nor has there been a loss of the profit of any goods by the perils insured against, except the 1200 sacks, which have been paid for by the money paid into Court. If, indeed, it attached to the profit of those on shore, there has been no loss of that profit by perils of the sea, but only a retardation of the voyage for which the defendants are not responsible, unless on a policy especially provided for such an event.

Judgment reversed.

Wilson v. Jones.

L. R. 2 Ex. 139-152 (s. c. 36 L. J. Ex. 78; 16 L. T. 669; 15 W. R. 435).

Insurable Interest. — Policy on Adventure. — Atlantic Cable. [139]

The plaintiff, being a shareholder in the Atlantic Telegraph Company, caused himself to be insured with the defendant in a policy, which was a common printed form of a marine policy, filled up with interlineations and marginal additions, and which contained the following words: "At and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until it be laid in one continuous length between Ireland and Newfoundland, and until one hundred words shall have been transmitted each way . . . the ship, &c., goods, &c., are and shall be valued at £200 on the Atlantic cable, value, say on twenty shares, at £10 per share:" and also, written opposite to the clause, "touching the adventures, &c.," the words, "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from Ireland to Newfoundland, and *vice versâ*, and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and *vice versâ*, shall be an essential condition of the policy." The attempt to lay the cable failed, through the cable breaking whilst it was being hauled in to remedy a defect in the insulation; but one-half of the cable was saved.

Held, first, that the policy was not on the cable, but on the plaintiff's interest in "the adventure," that is, on the profits to be derived by him from the success of the adventure; and *semble*, that the adventure was the attempt to lay the cable on that voyage.

Secondly, that such an interest was an insurable interest.

Thirdly, that the loss was a loss by the perils insured against.

Fourthly, that whether the adventure insured was the adventure of [140] laying the cable on that voyage, or of laying it generally, the loss was total, inasmuch as by the breaking of the cable the probability of laying it was reduced to a mere chance, and the case was therefore within the rule making the loss of a ship total at the time of capture, although there may exist a *spes recuperandi*.

Appeal from the decision of the Court of Exchequer (L. R. 1 Ex. 193), discharging a rule to set aside the verdict for the plaintiff, and to enter a verdict for the defendant.

The plaintiff, being a shareholder in the Atlantic Telegraph Company, caused himself to be insured with the defendant, in the policy now sued upon, which was the ordinary printed form of a marine policy, with interlineations and marginal additions.

The material words of the policy were as follows: "Lost or not lost, at and from Ireland to Newfoundland, the risk to commence at the lading of the cable on board the *Great Eastern*, and to continue until the cable be laid down in one continuous length between Ireland and Newfoundland, and until one hundred words shall have been transmitted from Ireland to Newfoundland, and *vice versa*, the risk on the policy then to cease and determine, upon any kinds of goods and merchandises, &c." (in the ordinary words of a marine policy, the *Great Eastern* being the ship named); "the said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers, in the policy are and shall be valued at £200 on the Atlantic cable, value, say on twenty shares, valued at £10 per share."

In the margin, opposite the usual clause, "touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in the voyage, they are of the seas, &c., and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, and ship, &c., or to any part thereof," were written the words, "it is hereby understood and agreed that the policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable, from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from

Ireland to Newfoundland, and *vice versa*; and it is distinctly declared and agreed that the transmission * of the said one hundred words from Ireland to Newfoundland, and *vice versa*, shall be an essential condition of the policy." There was the usual warranty against average under £3, unless general.

The adventure having failed by the breaking of the cable whilst it was being hauled in to remedy a defect in the insulation,¹ one-half of the cable being saved, the plaintiff brought the present action, and obtained a verdict, subject to leave reserved to the defendant to enter a verdict for him, on the ground that the loss was not a loss by the perils insured against, or, if any, only an average loss, and that there was no evidence that it was higher than £3 per cent, or to reduce the damages, on the ground that, if any loss, it was an average loss.²

¹ See the judgment of WILLES, J., *post*, p. 303.

² After the commencement of the action, another and successful attempt was

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The rule having been granted, and afterwards discharged by the Court below, the defendant appealed.

Brett, Q. C. (Cohen with him), for the appellant, the defendant. — The first inquiry is, what is the subject-matter of the policy? It is laid down in the judgment of the Court below that this is an insurance on the adventure; but to insure the success of a maritime adventure is a wager, and to make the policy good some other construction must be given to it.

[WILLES, J. — The distinction between a wagering contract and one which is not wagering, depends upon whether the person making it has or has not an interest in the subject-matter of the contract.

BLACKBURN, J. — Does not this resemble an insurance on profits? Is it not an insurance of the profits to arise from the success of the adventure?]

In Arnould Ins., Vol. I. p. 288 (2nd ed.), it is said of freight, that in order to make it an insurable interest the assured "must be so situated with respect to it as that he would certainly have earned freight but for the intervention of the loss;" and the same is laid down with respect to insurance on profits (p. 290). Now, there is no such certainty here. But further, in an ordinary insurance on *profits, the goods from which the [*142] profits are to arise are on board, and are subject to the risks insured against; but the profits here must arise from the shares, which were never on board or at risk, and which, according to the decision in *Paterson v. Harris*, 1 B. & S. 336, 30 L. J. Q. B. 354, could not be insured. If, then, the shares could not be insured, how can the profits, which are an excrescence of them, be the subject of insurance?

[WILLES, J., referred to *M'Swiney v. Royal Exchange Assurance Company*, 14 Q. B. 634, 646, 18 L. J. Q. B. 193, 19 L. J. Q. B. 222, p. 279, *ante*.]

The construction of the policy itself, which must be construed as a marine policy, shows that not the adventure but the cable was the subject-matter of insurance. The words are, "on the Atlantic cable;" these words standing alone would plainly make the cable the subject-matter, and their effect is not altered by those which follow, "value, say on twenty shares, at £10 per share," for these words only indicate the mode in which the plaintiff's interest

made to lay a telegraphic wire on the same route, and the old broken line was also picked up, repaired, and laid down safely.

in the cable is arrived at. Again, in the words inserted in the margin the cable is still the subject referred to; the perils are perils "attending the conveyance and successful laying of the cable." The rest of these special words relate only to the duration of the risk, which might as well, had it been possible to calculate it, have been expressed as a specified time. Wherever, therefore, in the policy the subject-matter of insurance is referred to, it is described as the cable, and the policy appears intended to secure its safety during the whole period of its manipulation in the operation of laying it down; that period being further extended till the transmission of one hundred words.

[BLACKBURN, J. — On that construction, if the cable were not injured, but an accident happened to the *Great Eastern*, by which the adventure were rendered impossible, the loss so caused would not be within the policy. But was it not intended to cover any such risk and danger?]

Secondly, the loss which is to be made good must be a loss caused by the perils insured against; the next question will therefore be, what were the perils included in the policy, and was this loss proved to have been caused by them? The general [*143] words *inserted in the margin must be read in after the words of particular description, and be limited by the context. In the absence of these words, a peril causing the loss must have been shown, being an ordinary peril of the sea; these words extend the policy to extraordinary perils of the same kind, that is, to such a peril as may happen in the most successful voyage, but to nothing further. But in this case the weather was calm, and nothing was being done but what the parties contemplated as to be done on the most successful voyage. The cause of the loss may have been an inherent defect in the cable; but at least no proximate cause of the loss is proved, coming within the description of the perils insured against, and the case is like that of a ship going down in a perfectly calm sea.

[BLACKBURN, J. — Is there any case or authority showing that it is necessary for the insured to prove a storm, or any other definite cause of the loss? It is certainly not the usage to put him upon showing affirmatively that the cause of loss was an ordinary sea peril.

LUSH, J. — It is for the defendant to prove the contrary affirmatively, as upon a plea of unseaworthiness.

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WILLES, J. — A case was tried before me on the Northern Circuit on a policy of insurance, in which it appeared that the ship left port loaded with a cargo of timber, and on the following night sank. There was no storm, nor was any cause of the loss proved. I told the jury that this was evidence on which they might well find unseaworthiness, but they found the contrary. I should have preferred a verdict for the defendant; but no suggestion was made that the loss was not a loss by perils of the sea.]

Thirdly, this is, at least, not a total loss. If the insurance is on the cable, it cannot be suggested that the loss is total. If, on the other hand, it is on the adventure, it must be admitted, and it is an argument against that construction, that the matter is so vague and indefinite as to be difficult to deal with. But, even in this case, the adventure is to be realised by means of the cable; the possession, therefore, of the cable goes far to realise the adventure, and unless the cable is totally gone, there cannot be said to be a loss of the whole adventure.

[LUSH, J. — The adventure insured was the adventure of laying the cable on that occasion.

* WILLES, J. — The risk is specifically limited to the [*144] loading of the cable on board the *Great Eastern*, which seems to refer to that occasion only.

BLACKBURN, J. — Even assuming the insurance to be on the adventure of laying the cable generally, and not limited to that particular occasion, is not the case analogous to the case of the capture of a ship with a *spes recuperandi*? In such a case the loss is considered as total at the time of capture, and unless the recapture is made before action brought, or, by the American law, differing in that respect from ours, even though the recapture is made before action brought, the assured is entitled to recover as for a total loss. Now here the chance of recovering from this accident had not been realised before action brought.]

Temple, Q. C. (Leofric Temple with him), for the plaintiff, was not called upon.

WILLES, J. — This is an appeal from the decision of the Court of Exchequer discharging a rule to enter a verdict for the defendant in an action on a policy of insurance, upon the ground that the loss was not a loss by the perils insured against, and that, if it was so, it was not total, and that there was no proof of an average loss over £3 per cent. Everything depends on the con-

struction of the policy, taken in connection with the circumstances referred to in it, and especially on the construction of the written words superadded to the ordinary form. These words contain an unusual description, and also unusual provisions relating to a novel and speculative enterprise, by which a joint-stock company sought to establish for profit a telegraph across the Atlantic, and for that purpose to lay down a line of cable for two thousand miles over the bottom of the sea. It was an enterprise involving great risk and uncertainty, and the value of the shares in the company depended upon its success, and were affected by the same risk. The plaintiff had shares in the company; and it is material to observe the character of his interest depending upon his ownership of these shares. Without referring further to authority or reasoning over again what has been decided by the highest authority, it may be stated (as it has been asserted in argument) that the plaintiff had, in respect of his shares, no direct interest in the [* 145] cable. As a shareholder, he had an interest in the * profits to be made by the concern, but he had none in the property of the concern itself. This was the ground on which it was decided that such an interest was not within the Statutes of Mortmain. *Myers v. Perigal*, 11 C. B. 90, 21 L. J. C. P. 217, 2 De G. M. & G. 599, 22 L. J. Ch. 431. It is with reference to that state of facts, familiar to every man of business, that we must read the policy to see what has been insured, and whether it was not the interest the plaintiff had in the enterprise, that is, the advantage to arise to him from the contingency of the cable being laid down and becoming an effectual cable, which, it was assumed, it probably would be, if one hundred words were transmitted each way. A further question has arisen, whether the policy referred to this particular occasion, or to any attempt to lay the cable, and though it is not necessary to decide this point, it will be proper to consider it.

The first question therefore is, what was the subject-matter insured? Is this, as has been contended, an insurance on the cable, or is it an insurance of the plaintiff's interest in a share of the profits to be derived from the cable which was to be laid down? In one sense, indeed, it is an insurance on the cable; that is, it affects the cable, as an insurance on freight affects the ship. The state of the ship and freight are so connected that it is impossible that they should be dis severed, except in cases where

the loss of freight is effected by the loss of the goods only, in which case it might equally be said that the insurance on freight is an insurance on the goods. But except in that sense it will appear, when the language of the policy is examined, that the insurance is an insurance, not on the cable, but on the interest which the plaintiff had in the success of the adventure. The words in which the object insured is described are as follows: "The said ship, &c., goods and merchandise, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at £200 on the Atlantic cable." If these words stood alone, they would be obviously an insufficient description of the interest which the plaintiff possessed. But they are followed by the words "value, say on twenty shares, valued at £10 per share," which qualify the previous words, and are themselves followed by a context, plainly showing that the thing *insured was the value [* 146] of the plaintiff's shares, or, rather, his interest in the profits to be derived from his shares when the cable should be laid, either on that occasion or at some future time. In the margin the following words are written: "It is hereby understood and agreed, that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable." Looking at the subject-matter and at these words, and excluding any argument as to the meaning put by judicial construction on the more general words printed at the end of the policy, "touching the adventure and perils, &c., they are of the seas, &c., and all other perils, losses, and misfortunes, &c.," it is impossible to avoid arriving at the conclusion stated by MARTIN, B., as the opinion of the Court below, that this was an insurance on the plaintiff's interest in the adventure.

The argument addressed to us in opposition to this view at one time almost took the form of saying that such a contract would be a wager. If it is meant that it would be within the 8 & 9 Vict., c. 109, we must reject the argument, for that statute has no application to a contract upon a matter in which the parties have an interest. It relates to betting upon a mere future event, not to contracts of indemnity; which, though they may be properly classed with wagers in the scientific distribution of law, are differently dealt with in its practical administration. But it is

said that the transaction is unusual, improbable, and out of the ordinary course, and that the Court ought not to support an insurance of so speculative an interest. If, however, we start with the consideration that this policy is an insurance on profits, though we admit the danger, the only conclusion will be that we ought to make ourselves quite sure that the language used has the meaning attributed to it; but we are not to be deterred from giving it effect by reason of the alleged danger. It would, indeed, be extremely dangerous to do so, when we consider that the same argument might have been urged in *M'Swiney v. Royal Exchange Assurance*, 14 Q. B. 634, 646, 18 L. J. Q. B. 193, 19 L. J. Q. B. 222, as to the insurance of profits on goods. The plaintiff there had bought six thousand bags of rice, then lying in an Indian port, which he had sold to a merchant in London at a considerable * profit; and he insured on the profits. After part of the rice had been put on board, the vessel on which it was being loaded was driven to sea, the rice that had been shipped was spoilt, and by reason of the delay in the voyage the residue could not be forwarded in time. It therefore became impossible to fulfil the contract, and the expected profits were lost. The defendants offered to pay the ordinary profits on the rice shipped, but resisted the claim for profits on that which was not on board. The argument was principally that those profits were not sufficiently described; and it was a subsidiary argument that the goods not loaded were never in peril within the meaning of the policy. In the Court of Queen's Bench judgment was given for the plaintiff, no one supposing that by reason of the resemblance of the contract to a wager it could not be enforced. In the Exchequer Chamber that judgment was reversed, on the ground that the words were not sufficient to describe these speculative profits, and that the loss of the rice not shipped was not a loss within the perils of the sea insured against. In delivering the judgment of the Court, PARKE, B., said: "We have no doubt that the plaintiff might have recovered, in the events which have happened, for a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover the special interest from the time the rice was appropriated by the vendors and ready to be shipped at Madras, and also to assure him against losses of the expected profit, not merely by the loss of all the rice by the perils of the sea, but by the loss of any part of it, or the loss of

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the ship, or delay of the voyage beyond the month of May; in any of which contingencies the special interest in profit would have been entirely defeated." And again, at the close of the judgment, he says: "According to the true construction of the policy, it attached to the profit on no goods, nor has there been a loss of profit on any goods by perils insured against, except on the 1200 bags, which has been paid for by the money paid into Court. If, indeed, it attached to profit on those on shore, there has been no loss of that profit by the perils of the sea, but only a retardation of the voyage, for which the defendants are not responsible, unless the policy especially provided for such an event." The present policy is evidently framed with skill and under good advice, and was, doubtless, drawn with a reference to * the case I have just referred to. I am the more fortified [* 148] in this conclusion as to what is the subject-matter insured, from the difficulty of suggesting any other construction of the policy, except that it is an insurance on the cable, which, for the reasons before mentioned, is not a rational construction.

The insurance, then, was on the adventure, but what was the extent and duration of that adventure? I will here refer to the language describing the duration of the risk. The policy is to cover every risk attending the laying of the cable, "from and including its loading on board the *Great Eastern*, until one hundred words be transmitted from Ireland to Newfoundland, and *vice versa*; and it is distinctly declared and agreed that the transmission of the said one hundred words from Ireland to Newfoundland, and *vice versa*, shall be an essential condition of the policy." The true conclusion to be drawn from these words, and especially from the concluding ones, is either that the insurance was on the adventure limited to the endeavour to lay the cable on that occasion; or, if not, it must at least be imputed to the parties that they supposed, unless the result were then arrived at, that there would be an end of the matter.

The second question is, whether this is a loss by the perils insured against. If the insurance were limited to the printed language in an ordinary policy, it would be necessary to do that in which we should have little authority to guide us, namely, to put a construction on the words ordinarily occurring at the end of the clause enumerating the risks insured against: "all other perils, losses, and misfortunes that have or shall come to the hurt, detri-

ment, or damage of the said goods, and merchandises, and ship, &c., or any part thereof." But this is unnecessary; for, on reading the marginal words, which provide that the policy "shall cover every risk and contingency attending the conveyance and successful laying of the cable," those words being introduced by the words "in addition to the ordinary perils," it appears that the parties have decided this question for themselves; and that this being a risk and contingency attending the successful laying of the cable, it is within the policy, unless the facts show that the loss was caused by a peril only to be attributed to an inherent vice of the cable itself, or to some other implied exception [* 149] * to the perils included in the policy. This brings me

to the statement of what actually happened, which is as follows: After stating that the ship started with the cable on board, the case goes on to say: "On the morning of the 2nd of August, when from 1100 to 1200 miles of the cable had been laid down, it was discovered that the electric current did not pass. A portion of the cable was then hauled back into the ship; while this was being done, the cable parted on board ship inside the bows, and the broken end fell into the sea. The weather which prevailed at and about the time of the parting of the cable was described in the ship's logs, and proved in evidence, to have been as follows: 'Light westerly airs, and fine clear weather.'" Then follows a statement of the attempts that were made to recover the cable. No averment of *mala fides* is made, or probably could be; nor is it stated that the accident was due to any inherent vice of the cable; therefore we have it that in the course of laying down the cable it became necessary to haul it in, that in hauling it in a portion broke, that those in charge of the business were or may have been under a necessity of hauling it in, and that this breaking of a portion caused the failure of the whole adventure, if considered as the adventure of laying the cable on that voyage. We are not called on to pronounce any judgment upon the facts. The only question made at the trial was, whether there was any evidence to go to the jury of a loss by the perils insured against. Having read the language of the policy, I will only say, that on these facts it is impossible to come to the conclusion that there was no evidence on which the jury might find that the loss was a loss by perils insured against.

Thirdly, assuming that there was a loss of the subject-matter

No. 5. — *Wilson v. Jones*, L. R. 2 Ex. 149-151.

of the insurance by the perils insured against, was there a total loss? It was probably rightly agreed, that if the insurance was on the cable, there was no total loss; but it is not necessary to examine this, because our construction of the policy is, that it was not the cable, but the plaintiff's interest in the adventure, which was the subject of insurance. If, then, we consider the adventure as limited to that one attempt, or if what was insured was the profit to be made by successfully laying down the cable on that occasion, there is clearly a total loss; if, on the other hand, what was * insured was the whole adventure in which [* 150] the plaintiff was interested, and which was intended to be realised in that attempt, then by the defeat of that attempt there was a total loss, on the same principle on which a vessel is totally lost to the insured by capture by the enemy, although the presence of ships of war of its own nation makes it more probable that it will be recaptured, than that it will be taken into a hostile port. It is a total loss at the time. However subsequent events might affect the result, the loss was presumably and conventionally total at the period when it occurred. I will therefore conclude by saying that this was an insurance on the plaintiff's interest to the extent of £200 in an adventure which consisted in laying down the electric telegraph cable in such a condition as to transmit a message, either on that particular trial by the *Great Eastern*, or if not on that particular trial, then in the adventure generally. The former opinion is, I think, right; but, taking into consideration the nature of the subject-matter, it was, in any case, totally lost by the loss of all chance of laying the cable on that voyage. The judgment must therefore be affirmed.

BLACKBURN, J. — I am of the same opinion. I agree in all that my Brother WILLES has said, and will only add a few words. As to the argument, that this policy would on the plaintiff's construction be a wager, I apprehend that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to; and I know no better definition of an interest in an event than that indicated by LAWRENCE, J., in *Barclay v. Cousins*, 2 East, 544 (6 R. R. 505), and more fully stated by him in *Lucena v. Craufurd*, 2 B. & P. (N. R.), at p. 301 (p. 151, *ante*), that if the * event happens the party will gain an advan- [* 151]

tage, if it is frustrated he will suffer a loss. Now we must see whether the plaintiff was in this position. He was interested in a company which was about to lay down a cable across the Atlantic. If that event happened, there can be no doubt the owner of shares in the company would be better off; if it did not happen, there can be no doubt his position would be worse. It follows, then, equally without doubt, that if by proper words the parties have entered into a contract of insurance for that interest, the policy is good. Now, if they had stopped at the word "cable," the plaintiff's interest would not have been correctly or sufficiently described, according to the principle of the case of *MSwincy v. Royal Exchange Assurance Company*, 14 Q. B. 634, 646, 18 L. J. Q. B. 193, 19 L. J. Q. B. 222. Neither if they had said that it was the cable as shipped on board the *Great Eastern*, would it have been a sufficient description. But here they have used words as to which I will only say that no one who looks at them fairly, and reads them in connection with the circumstances, can fail to see that the intention of the parties would be frustrated by such a construction as is contended for by the defendant. Then, as to the question whether the loss is within the perils insured against, were those perils only the ordinary perils? or was it intended by the words "in addition to the ordinary perils, &c.," to include all dangers occurring [* 152] in the course * of laying the cable which might interrupt the enterprise, and so frustrate the profits which the plaintiff hoped to derive from its success? It cannot be doubted that the plaintiff meant to stipulate for an indemnity against any injury to his interest by dangers so occurring; the cable was, in fact, broken in an attempt to haul it in in the course of laying it; it is therefore impossible, if any sense is to be given to words used, not to say that what has happened was within the risk and contingency insured against. Lastly, I am clearly of opinion that the interest insured was the plaintiff's interest in the laying of the cable on that particular voyage. But if it be otherwise, and the interest was an interest in the cable being laid at any time, there was still a total loss; for although there was some chance of the cable being recovered, it was a mere chance; and the same difficulty would have to be encountered on any future attempt to recover it, that had baffled the efforts of those engaged on the present occasion. The loss then was total; and if there was any-

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thing to abandon, the underwriters were entitled to the benefit of it. But though it was not necessary to decide the point, the insurance was, in my opinion, for that voyage, and there was therefore nothing to abandon. The judgment of the Court below must be affirmed.

MELLOR, J., concurred.

MONTAGUE SMITH, J. — I concur; and I only wish to add that I think the insurance was on this particular voyage.

LUSH, J., concurred.

Judgment affirmed.

ENGLISH NOTES.

The following are instances of various transactions where an insurable interest has been maintained: —

A shipowner has been held entitled to insure and to recover in the name of "freight" the profit in the nature of freight which he expected to make by employing his own ship to carry his goods. *Flint v. Flemyng* (1830), 1 B. & Ad. 45, no. 50, *post*.

A shipowner placed his ship in the hands of the plaintiffs as agents to make contracts of affreightment, and they, with the assent of the captain, drew bills for the amount of their disbursements, to be charged upon the freight. The Court of Exchequer held that the plaintiffs had an insurable interest in the freight to the extent of their advance; and might recover upon a policy describing the subject-matter of the insurance as "an advance on account of freight." *Wilson v. Martin* (1856), 11 Ex. 684, 25 L. J. Ex. 217. The expression "advance on account of freight" is however more generally used to describe a payment by the merchant to the shipowner, which is not repayable in case of the freight proper not being earned, and which is, in effect, a sum at the risk of the merchant, and in which the merchant and not the shipowner has an insurable interest. An expression in a charter-party indicating that such an advance is to be insured by the merchant has been held as conclusive to show that it is not repayable by the shipowner. *Hicks v. Shield* (1857), 7 El. & Bl. 633, 26 L. J. Q. B. 205, 3 Jur. (N. S.) 715.

The lender upon a bottomry bond, as he takes upon himself the peril of the voyage, has an insurable interest in the ship. *Simmonds v. Hodgson* (1832), 3 B. & Ad. 50.

Passage-money, being generally payable beforehand and at all events, is not at common law the subject of insurable interest in the shipowner; but it may be insured by the passenger as a sum in which he has an interest. The passenger when he has paid his passage-money has an insurable interest analogous to that of the merchant in freight payable

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in advance. Arnould, 6th ed., p. 36. But the shipowner having been made liable by the Passenger's Act, 1852 (and now by the Merchant's Shipping Act, 1894, ss. 331-335), to forward shipwrecked passengers may insure his statutory liability. *Gibson v. Bradford* (1855), 3 El. & Bl. 516, 24 L. J. Q. B. 159, 1 Jur. (N. S.) 520.

Even if passage-money be made by the contract payable on arrival, it is not covered by an insurance on "freight," at least if there are goods shipped which are the subject of freight properly so called. *Dinoon v. Home and Colonial Assurance Co.* (1872), L. R. 7 C. P. 341, 41 L. J. C. P. 162, 26 L. T. 628.

Insurance on "chartered freight" is illustrated by the case of *Rankin v. Potter*, No. 7 of "Abandonment," 1 R. C. 70, see per BLACKBURN, J., p. 78. Where by the charter-party the hire of the ship is to cease for any period during which the ship is incapacitated (*e. g.* by want of repairs), an insurance on "chartered freight" has been held to include the loss of hire sustained under this clause by the immediate action of a peril insured against. *The Alps* (1893), 1893, P. 109, 62 L. J. P. D. & A. 59, 68 L. T. 624, 41 W. R. 527; *The Bedouin* (C. A. 1893), 1894, P. 1, 63 L. J. P. D. & A. 30, 69 L. T. 782, 42 W. R. 299.

"Profit on charter," as a subject of insurance by charterers, is illustrated by *Asfur v. Blundell* (C. A. 1895), 1896, 1 Q. B. 123, 65 L. J. Q. B. 138, 73 L. T. 648, 44 W. R. 130. The plaintiffs had chartered the ship for a voyage at a lump freight of £3900. They insured £2000 on "profit on charter" free from average. They employed the ship as a general ship to carry cargo under bills of lading. Part of the cargo consisted of dates, which, owing to a peril of the sea, were spoiled, and became unmerchantable as dates, so that they earned no freight. Consequently the freight earned became less than the chartered freight. Lord ESHER explained the contract thus: "If the plaintiffs got more in freights than they had to pay for the chartered freight, the surplus would represent a profit; but if they were prevented by sea perils from doing that, they would be prevented from making any profit. That was the plaintiffs' speculation, and the anticipated profit was the subject-matter of the insurance." The subject-matter had therefore been totally lost, and the exception "free from average" did not apply. The plaintiffs were held entitled to recover their expected profit, measured by the excess of the whole bills of lading freights over the lump chartered freight.

AMERICAN NOTES.

The principal cases are cited in 1 Biddle on Insurance, sect. 180, and the second in 1 May on Insurance, sect. 90.

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A commission-merchant, to whom the cargo of a vessel is consigned for sale, has an insurable interest in his expected commissions, and may insure them while the vessel is on her voyage. *Putnam v. Merc. M. Ins. Co.*, 5 Metcalf (Mass.), 386 (A. D. 1843). The Court said the question had not yet been decided, and cited and quoted largely from *Lucena v. Craufurd*, ante, p. 151, pronouncing its "reasoning sound and sagacious," and continued: "There is also a case in our own books where the right of the consignee to effect insurance on his commissions is mentioned without expressing any doubt in regard to it. *French v. Hope Ins. Co.*, 16 Pick. 397. This was an insurance on profits on merchandise. It was held that the plaintiff had a substantial interest at risk, for if the ship had arrived safely, he would have been entitled to profits; and they depended on her safe arrival. The learned Judge, who delivered this opinion, says: 'The objection principally relied upon is, that the plaintiff was not the owner of the merchandise; that he could not have insured the goods, and *a fortiori* not the profits on the goods which did not belong to him. The rule, if received to the extent laid down, would prevent the insurance of commissions on goods consigned to the plaintiff. If in the case of a consignee, the goods should arrive safely, he would be entitled to commissions on the sale. So in the case at bar, if the goods had arrived, the plaintiff would have realized a profit. The cases seem to us to be perfectly analogous. In each, the party claiming profits or commissions has either to run the risk and bear the loss himself, or to get the insurance against marine risk. In each case he has a real interest to protect.'

"The case at bar, indeed, stands on the very borders of the line — which may be deemed almost shadowy — where interest ends and expectation begins; but the line, however thin, must be drawn somewhere, or the difference between wager policies and those coupled with an interest must cease. And upon consideration we are of opinion that the regular consignee of goods has an interest in his expected commissions equivalent to that of expected profits, and that such commissions are the lawful subject of insurance." See *Locke v. N. A. Ins. Co.*, 13 Massachusetts, 61, citing *Craufurd v. Hunter*, 8 T. R. 136; *Fosdick v. Norwich M. Ins. Co.*, 3 Day (Connecticut), 108. In *French v. Hope Ins. Co.*, cited above, the Court said: "Ever since the case of *Grant v. Parkinson*, 3 Doug. 16, . . . it has been understood that profits were insurable."

In *Sawyer v. Dodge County M. Ins. Co.*, 37 Wisconsin, 503, this question was examined at great length and with great care, the case of *Lucena v. Craufurd* being very much relied on both by counsel and Court, and it was held that a valid insurance might be made upon grain raised upon land acquired by the insured after the date of the policy.

"A policy on profits on goods is valid." *Abbott v. Sebor*, 3 Johnson Cases (New York), 39, by KENT, J., citing *Grant v. Parkinson* and *Craufurd v. Hunter*, 8 T. R. 13, and observing, "The point has never been decided by this Court." See *Patapsco Ins. Co. v. Coulter*, 3 Peters (U. S. Supreme Ct.), 222.

Expected commissions are insurable. *Wells v. Philadelphia Ins. Co.*, 9 Sergeant & Rawle (Penn.), 103.

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Wilson v. Jones is cited in *Rohrback v. Germania F. Ins. Co.*, 62 New York, 47; 20 Am. Rep. 451.

One who has placed goods in a fishing-vessel to be taken by seamen as needed and paid for out of their share of the catch, has an insurable interest in such shares. *Hancox v. Fishing Ins. Co.*, 3 Sumner (U. S. Sup. Ct.), 132. STORY, J., said, "The questions . . . are of a somewhat novel character," and cited *Lucena v. Craufurd*, 5 B. & P. 294; *Wolff v. Horncastle*, 5 *ibid.* 316; *Wells v. Phila. Ins. Co.*, *supra*.

A charterer may insure. *Murdock v. Franklin Ins. Co.*, 33 West Virginia, 407; 7 Lawyers' Rep. Annotated, 572.

No. 6. — CROWLEY v. COHEN.

(1832.)

No. 7. — MACKENZIE v. WHITWORTH.

(C. A. 1875.)

RULE.

If the subject-matter of an insurance is rightly described in the policy, it is not necessary to specify the interest of the assured, unless the interest is of such a nature as to be material to the risk insured against; and (except in such a case) the assured may recover upon the policy for such insurable interest as he has.

Where an underwriter has subscribed a policy of insurance, he has by the common law an insurable interest, to the extent of his subscription, in the subject-matter of the insurance; and (the prohibitions of the statute 19 Geo. II., c. 37, s. 4, being repealed by 30 Vict., c. 23) he can re-insure the whole amount for which he is liable (including the original premium) by a policy on the same subject-matter without stating that the transaction is a re-assurance.

Crowley v. Cohen.

3 Barn. & Adol. 478-488.

Insurance. — Interest need not be specified in Policy.

[478] Carriers on a canal effected an insurance for twelve months upon goods on board of thirty boats named, between London, Birmingham,

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etc., backwards and forwards, with leave to take in and discharge goods at all places on the line of navigation. The insurance was agreed to be £12,000 on goods, as interest might appear thereafter; the claim on the policy warranted not to exceed £100 per cent. : and £3000 only were to be covered by the policy in any one boat on any one trip. The premium was 30s. per cent.

Held, that an insurance "on goods" was sufficient to cover the interest of carriers in the property under their charge; for, in general, if the subject matter of insurance be rightly described, the particular interest in it need not be specified.

Held, also, that the policy was not exhausted when once goods to the value of £12,000 had been carried by all the boats, or by each of them, but that it continued, throughout the year, to protect all the goods afloat at any one time, up to the amount insured.

Held, further, that upon the loss of goods on board one of the boats, the assured was entitled to recover that proportion of such loss which £12,000 bore to the whole value of the goods afloat at the time; and not the proportion of £12,000 to the whole amount carried during the year.

Assumpsit on a policy of insurance. Plea, the general issue. At the trial before Lord TENTERDEN, C. J., at the London Sittings after Hilary Term, 1831, a verdict was taken for the plaintiffs, subject to the opinion of this Court, upon the following case: —

The action was brought upon a policy effected by the plaintiffs, and subscribed by the defendant, for £1000, whereby the plaintiffs caused themselves to be insured for twelve calendar months, commencing on the 11th of April, 1828, "by canal navigation boats containing goods at work between London, Wolverhampton, Birmingham, &c. backwards and forwards, and in any rotation, upon goods and upon the body, tackle, &c. on thirty boats," as per margin of the policy; beginning the adventure upon the goods from the loading thereof on board, and continuing it till the same should be discharged and safely landed; and the vessel was to have "leave to take in and discharge goods and merchandise at all places on the regular line of canal between the aforesaid places and London, without being deemed a deviation." It was then stipulated as follows: "The said ship, &c., goods and merchandises, &c., for so much as concerns the assureds, by agreement between the assureds and assurers * in this policy, [*479] are and shall be¹ twelve thousand pounds on goods as interest may appear hereafter, to pay average on each package or

¹ Here the printed words "valued at" and goods filled up so as to adapt it in a very inartificial manner to this insurance. The instrument was the common printed form of policy on ship

description as if separately insured, warranted free from damage or loss that may arise from wet occasioned by rain, snow, or hail, or from any loss arising from plunderage, barratry, or pilferage, the claim on this policy warranted not to exceed £100 per cent." The premium was 30s. per cent. The following stipulation was written at the bottom of the policy: "£3000 only to be covered by the policy in any one boat on any one trip." The instrument bore a £30 stamp.

One of the boats named in the margin of the policy, and of which the plaintiffs were owners, departed from London on the 17th of January, 1829, on the above-mentioned line of canal, with goods of several persons on board, to the value of £1700, which were in the care of the plaintiffs as carriers, to be carried on freight from London to Wolverhampton. On the 29th of January the boat, with the goods on board, was accidentally sunk in the canal; the goods were damaged, and the plaintiffs in consequence were obliged to make compensation to the owners, and were also put to other expenses. It was agreed that the damage sustained should be settled by a reference, and that the arbitrator should calculate them according to that which the Court should decide to be the legal construction of the policy. Between the 11th of April, 1828, and the 29th of January, 1829, the boat in question had gone thirty-one trips on the line of canal, and she was on her thirty-second at the time of the loss. Between the two last [* 480] mentioned days, each of the * thirty boats mentioned in the policy had carried goods to the amount of £12,000 and upwards.

The objections taken to the right of the plaintiffs to recover were five. 1. That this policy, which pursued the ordinary form, did not cover the interest of the plaintiffs, since it purported to protect goods against the usual risks to which the owners of goods are liable, whereas the loss alleged was one arising out of the plaintiffs' liability as carriers to risks to which carriers are liable. 2. That the loss was not within the policy, the perils insured against being the ordinary perils in a sea policy, and the loss the consequence of a breach of special contract between the assured and those whose goods they carried. 3. That as soon as goods to the amount of £12,000 had been carried by the boats the policy was exhausted, or at least as soon as goods to that amount had been carried by each boat. 4. That supposing the policy not to be

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so limited, the underwriters were liable only to that proportion of the loss which £12,000, the sum insured, bore to the whole amount of the goods carried by the boats in the twelve months; that is, to the whole interest of the assured. 5. That according to the plaintiffs' construction of this policy, the stamp was insufficient; but this objection was not persisted in. The case was argued by

Campbell for the plaintiffs. With regard to the first objection, as between the plaintiffs and the underwriter, the claim in respect of this loss is for the damage to the goods. It is sufficient, as between them, that the policy is on the goods, and that they have been damaged on the voyage by a peril insured against. It is not necessary, in a policy of insurance, to state the precise
 * nature of the interest, and whether the property be abso- [* 481]
 lute or special. A consignor, a consignee, a prize agent (as such) may all insure; but they are not bound to specify what the interest is, *Carruthers v. Sheddon*, 6 Taunt. 14. And so as to the second objection: the contract between the assured and the other parties is nothing to the underwriter. He cannot pretend that this is a wagering policy; the plaintiffs only seek to recover the amount of damage which they have actually sustained by the injury to these goods. The third objection is answered by a reference to the nature and objects of the policy. It was to continue twelve months, and the intention evidently was, that the underwriters should be liable for damage to be sustained by the goods on board these boats during the whole time. The stipulations for leave to take in and discharge goods at all places on the line of canal, that no greater amount than £3000 should be covered by the policy in any one boat on any one trip, and that the claim on the policy should not exceed £100 per cent., all show that the limitation contended for is not according to the real sense of the contract. Then it is said, fourthly, if that limitation is not to prevail, the underwriter is still only liable for the proportion which £12,000 bears to the whole amount of goods carried in all the boats during the twelve months. According to this argument, if no damage occurred till the last day, and on that day a loss of goods to the amount of £1000 took place, then, although no other goods were afloat at the time, the underwriter would claim to pay, not £1000, but only a part of that sum in the proportion of £12,000 to the value of all the goods before carried in all the boats;

* by which mode of calculation, he might be liable in [* 482]

£1000 at the beginning of the year, and only a farthing at the end of it, for precisely the same amount of loss. The true measure of liability is the proportion of £12,000 to the value of all the goods afloat at the time of the loss; and it does not appear from the case that anything more was on the line of canal that day, than the goods valued at £1700, in the boat which was sunk.

Maule, *contra*. As to the first and second points: it may be admitted that this was an insurable interest, if the policy were rightly framed. But the interest here is not that described in the policy. The Courts have allowed much latitude in this respect, as where they held that a shipowner, carrying his own goods on a voyage, might insure his interest in them under the name of freight. *Flint v. Flemyng*, 1 B. & Ad. 45. But there are many instances in which a greater strictness of construction is still adhered to. A party lending money on bottomry has a complete interest in the ship; yet he cannot insure as on the ship. In *Simmonds v. Hodgson*, 3 B. & Ad. 50, the interest insured was "on bottomry," and the decision turned wholly upon the question whether the instrument alluded to by that expression in the policy, was a bottomry bond or not, though it was clear that the plaintiff had, at all events, a security on the body of the ship, capable of being insured. It was decided in *Glover v. Black*, 3 Burr. 1394, that a lender of money on *respondentia* could not insure as upon the goods and merchandise; and in a subsequent case, *Gregory v. Christie*, Park on Insurance, p. 14, where the insurance [* 483] was on goods, specie, * and effects of the plaintiff (the captain) on board the ship, and he demanded, under that insurance, money expended by him during the voyage for the use of the ship, and for which he claimed *respondentia* interest, Lord MANSFIELD, though he held that the plaintiff might recover, was of opinion that he would not have been so entitled, but for an express usage proved by several witnesses. The insurance by the present plaintiffs is precisely in the form which would be used by owners of goods sending them in other persons' barges. No other kind of interest is pointed out by the terms used. Yet the interest in this case is, in fact, one of a very special nature. It is that of a carrier, which consists of the gain to be made by freight, and the loss to be guarded against from damage or destruction of the goods. Now it will scarcely be said that this policy covers the gain, — the freight; and if the general words are not of a nature to protect this, how is

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it shown that they apply to the loss risked by the plaintiffs as carriers? Yet if their interest as carriers generally were covered by this policy, why should not it extend both to the expectation of freight and the risk of loss? It has been said that the policy, being on goods, covers any interest in them, absolute or special. It may be admitted that the assured need not be an absolute owner; but the interests to be protected must all be such as are carved out of one and the same entire right; and an interest arising merely from a liability, like that of a carrier, is not within this description. Suppose the goods here had been lost by the act of God or the king's enemies. Carriers are not answerable for these risks; yet the underwriter would have been liable to the assured upon the present policy. Another proof that this contract * of [* 484] insurance does not truly show the nature of the interest to be protected is, that the policy is an open one. The inference from that form of policy is, that the interest is of such a nature that it may be appreciated when the loss happens, without the aid of any previous convention among the parties, or estimate by which they have agreed to be bound. Thus an absolute interest in goods may be valued by reference to the invoice price; and an estimate may be taken by similar means, as to ship or freight. But it is not so with the interest of a carrier; that must be appreciated by some rule of calculation, which should be agreed upon beforehand. The present contract is in the nature of a re-assurance; for a carrier is an insurer: the risk provided against by such contract, if it could be previously estimated, would probably be calculated on the average quantity of losses which the parties effecting the re-assurance have to pay. This kind of contract is always considered as totally distinct from an original insurance,¹ and ought not to be described in the same general terms. As to the third point; if the policy was not exhausted when goods to the value of £12,000 had been carried by all, or at least by each of the boats, this contract was most improvident on the part of the underwriter; for, on the plaintiffs' construction, goods to the amount of £360,000 had, at the time of the loss, been protected by this policy; and the same proportion might have been carried during the remaining two months of the year. The premium of £180 for such a risk is so far below the ordinary rate, that the underwriter, at least, cannot be supposed to have understood the contract in the

¹ Park on Insurance, 419, and the authorities there cited.

[* 485] * sense now contended for. Lastly, the underwriter is liable only for that proportion of the loss which £12,000 bears to the whole value of the goods carried during the year. This is the rule in case of an open policy; the indemnity recoverable is to the loss as the sum insured to the whole interest protected by such policy. It is argued this would lead to an unjust result; and that in the present case it would be hard, if the plaintiffs carried £360,000 worth of goods during the year, that they should only recover in the proportion of one-thirtieth for any subsequent loss. But this is the consequence of insuring a carrier's interest in a form applicable only to a policy on the party's own goods. The indemnity may be inadequate to the loss, but the premium was not a sufficient consideration for a perfect indemnity.

Campbell in reply. A policy must state correctly what is insured; but there is no authority for saying that the reason why the party insures should also be expressed. *Glover v. Black*, 3 Burr. 1394, was decided on the ground of an established practice; and the Court expressly guarded against any application of the judgment there given to other cases than those of *respondentia* and bottomry.

Lord TENTERDEN, C. J. I am of opinion that the plaintiffs are entitled to recover. It is objected that this policy is not framed so as to cover the interest in respect of which they claim. But I agree in the proposition laid down in the argument on their side, that although the subject-matter of the insurance must be properly described, the nature of the interest may in [* 486] general be * left at large. Here the subject-matter is very sufficiently described, and the policy shows that the sum to be received in case of loss was to be for further consideration, "as interest might appear thereafter." The instrument is not artificially framed; it would have been better if it had expressly shown that the object was to indemnify the plaintiffs as carriers; still I think it is sufficient. Then it is contended that after goods to the value of £12,000 had been carried by all, or at least by each of the boats, the policy was exhausted. But this is inconsistent with the evident object of the contract, and with the limit which the parties have fixed by warranting that the claim on the policy shall not exceed £100 per cent. Then as to the mode of calculating the indemnity, the defendant insists that this

is to be done by ascertaining the proportion which £12,000 bears to the whole value of goods carried during the year, and allowing the assured such a proportion of the amount of loss. But the rule of calculation relied on by the defendant is never adopted in cases of policy on goods with liberty to change the cargoes. Here the whole value of the goods afloat at the time of the loss must be taken, and the plaintiffs will recover such a proportion of their loss as £12,000 bears to the value of all the property on board all the boats at the time of the accident, if that value exceed £12,000; if not, they will be entitled to the whole amount lost.

LITLEDALE J. I am of the same opinion; and I think it was not necessary that the interest of the plaintiffs should be more specially described. Goods in the custody of carriers are constantly described as their goods in indictments and declarations in trespass. *The plaintiffs here were liable, in [*487] particular cases, for the loss of the goods they carried, and had a special property in them on that account. The goods were, for the present purpose, their goods. As to the argument that this policy was exhausted when goods had been carried in all, or in each of the boats, to the amount of £12,000, I think that cannot have been the intention, where a policy was effected upon thirty boats continually going on this canal, and each of which might convey goods to that amount in a time far short of a year. It appears to me that the contract was, in effect, equivalent to a fresh insurance taking place at the time when each vessel started, and governing all that were then afloat; only instead of a renewed insurance, the object was obtained by a continuing policy. As to the amount the plaintiffs are to recover, I agree in the rule of calculation which my Lord has laid down.

PARKE J. It is admitted here that the plaintiffs had some interest which they might insure. It was that, in fact, which carriers ordinarily have. The only question is, whether the interest, such as it was, was sufficiently described in the policy. Now the particular nature of the interest is a matter which only bears on the amount of damages; it is never specially set out in a policy. The instrument in question, I think, does all in this respect that ever is done. Then as to the suggestion that when goods to the value of £12,000 had been carried, the policy was at an end; if that was so, the insurance was not for a year, but

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upon the first £12,000 worth of goods that should be carried. But I think it was clearly meant to be an indemnity, applicable to the successive cargoes. I am also of opinion that the [* 488] *compensation is not to be calculated in the manner proposed by the defendant. If it were to be (as contended on that side) in the proportion of £12,000 to the whole value of goods carried during the year, the result would be, that the underwriter's liability would have gone on diminishing through the year, and become less in proportion as more goods were carried. But I think the intention clearly was, that £12,000 should be insured upon each successive number of cargoes; and, therefore, that the whole value of the goods afloat at the time of the loss, compared with £12,000 will afford the true measure of the defendant's liability.

PATTESON J. It is only necessary, in such a policy as this, to state accurately the subject-matter insured, not the particular interest which the assured has in it. This is an answer to the objection that a policy like the present would cover the interest of a party sending his goods by another's vessel: it is not the less a policy upon goods. So, too, when it is said that this contract is in the nature of a re-assurance; the answer is, that it is still only an insurance upon goods in which the assured has a special interest. The suggestion that this policy had become exhausted is at variance with the contract itself: for the proviso, that only £3000 should be covered in any one boat on any one trip, shows that at least more than one voyage was contemplated, in which each boat might take as much as £3000 worth of goods; and this is quite inconsistent with the supposition that an insurance of only £12,000 was contemplated upon all or each of the boats.

Postea to the plaintiffs: the damages to be calculated on the principle above stated.

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1 Ex. D. 36-44 (s. c. 45 L. J. Ex. 233; 33 L. T. 655; 24 W. R. 287).

[36] *Marine Insurance. — Re-insurance. — Policy. — Interest.*

An underwriter who has subscribed an insurance "on goods" may re-insure by the same description, and the policy need not be expressed to be a re-insurance.

No. 7. — *Mackenzie v. Whitworth*, 1 Ex. D. 36, 37.

Case stated on appeal, under the Common Law Procedure Act, 1854, from a decision of the Court of Exchequer (L. R. 10 Ex. 142).

The declaration was on a policy of insurance, dated the 24th of April, 1873, whereby the plaintiff through his agents as well in their own name as for and in the name and names of all and every other person to whom the same did appertain, caused himself and them "to be insured, lost or not lost, at and from New Orleans to Revel . . . upon goods . . . beginning the adventure upon the said goods from the loading thereof on board the ship *Southampton* at as above." The goods, for so much as concerned that agreement, were valued at "£5000 on cotton." The declaration, after stating the policy, averred that the United

* States Lloyd's and Individual Underwriters at New York [* 37] were interested in the goods, and that the insurance was made for the use and benefit and on account of the persons so interested. The defendant pleaded amongst other pleas (4) denial of the interest alleged; (8) concealment of the fact that the nature of the interest of the plaintiff and the United States Lloyd's and Individual Underwriters of New York was that of insurers desiring re-insurance.

At the trial before POLLOCK, B., at the Liverpool Summer Assizes, 1874, it was proved that the plaintiff, an insurance agent, effected the insurance on behalf of the United States Lloyd's and Individual Underwriters of New York, who had effected an insurance on the goods, being cotton to be shipped by Tatman & Co., of New Orleans, to the amount of £80,000, and that the insurance sued on was in fact a re-insurance by the American underwriters of a portion of the risk, they retaining their full lines, £20,000. The defendant, an underwriter, subscribed the policy sued on for £200.

In the slip which was made on the 13th of January, 1873, the insurance was expressed to be "£5000, on cotton."

The defendant gave in evidence, by the testimony of witnesses whose evidence was not contradicted, that in all cases of re-insurance policies the invariable practice has been to disclose the fact of the insurance being a re-insurance. The fact of the policy being a re-insurance was not disclosed by the plaintiff to the defendant until after he had signed the policy, though it was disclosed to other persons who had effected policies in respect of the

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same risk, and the plaintiff before he sent on the slip was aware that it was a re-insurance.

The plaintiff and defendant gave evidence on the issue whether the concealment alleged in the 8th plea was a concealment of a fact material to the risk or material to be communicated to the defendant.¹

It was admitted at the trial that the plaintiff and the [* 38] United * States Lloyd's and Individual Underwriters of New York were interested in the goods, but as underwriters only.

The cotton of the value so insured by the American underwriters was shipped at New Orleans, the ship sailed on the 28th of February, 1873, and was with the cotton destroyed by fire on the 19th of March.

POLLOCK, B., ruled that although the plaintiff and the American underwriters were only interested as re-insurers, their interest was sufficiently described in the policy, and that the plaintiff was entitled to recover thereon unless the failure to communicate the nature of their interest was a concealment of a fact material to the risk or material to be communicated to the defendant, and he submitted to the jury the issues of fact raised by the 8th plea. The jury found for the plaintiff on all the issues, and a verdict was entered for him, leave being reserved to the defendant to move to enter the verdict for him.

A rule nisi having been obtained to enter the verdict for the defendant on the ground that the plaintiff, being only interested as a re-insurer, was not entitled to recover on the policy sued on, the Court of Exchequer (BRAMWELL, POLLOCK, and AMPHLETT, BB.), on the 10th of February, 1875, discharged the rule (L. R. 10 Ex. 142).

The question for the Court of Appeal is whether the interest of the plaintiff and of the United States Lloyd's and the Individual Underwriters of New York was sufficiently described in the policy sued on, the risk being a re-insurance; whether such risk was covered by the policy; and whether the decision of the

¹ In the report of the case below L. R. 10 Ex. at p. 143, it is stated that "the defendant gave evidence that he would not have underwritten the policy if he had known that it was a re-insurance, and that it was the practice of many underwriters to refuse re-insurances." A paragraph to this effect was inserted originally in the case on appeal, but was struck out at chambers as immaterial to the present question.

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Court of Exchequer on that point was wrong. If the Court should be of opinion that that decision was wrong, the verdict is to be entered for the defendant. If *contrà*, judgment to be signed on the verdict for the plaintiff for £206 5s.

Nov. 16. Herschell, Q. C., and Baylis, Q. C., for the defendant, appellant. The custom proved at the trial was not merely to disclose the fact of the insurance being a re-insurance, but to state it expressly in the slip and policy. This does not appear distinctly from the case, but the evidence was so treated by POLLOCK, B., in his summing up, and it will not be disputed by the plaintiffs' *counsel. This is the point intended to [*39] be raised, and if the Court considers that it is not distinctly raised, the defendant desires to have the case re-stated. There is a substantial reason why underwriters should decline re-insurances, because instead of having only one party to settle with as in ordinary insurances, a third party is introduced who must be consulted.

[For the rest of the arguments and the authorities cited on both sides it is sufficient to refer to the report of the argument in the Court of Exchequer (L. R. 10 Ex. 143-146).]

Benjamin, Q. C., and A. T. Lawrence, for the plaintiff.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Lord CAIRNS, L. C., BLACKBURN and BRETT JJ.), was read by —

BLACKBURN, J. This is an appeal against the judgment of the Court of Exchequer, discharging a rule obtained to enter a verdict for the defendant.

The action is on a policy of marine insurance, which is set out in full in the declaration. It is in the ordinary form of a Lombard Street policy, and the blank in the printed form where it is usual to insert the description of the subject-matter of the insurance is thus filled up: — “£5000 on cotton.” The plaintiff made the policy as agent for and to protect the interest of American underwriters who had insured cotton for Tatman and Co., of New Orleans, to the amount of £80,000, and it was, in fact, a re-insurance to the amount of £5000.

At the trial a question was raised as to whether there was an undue concealment. On that issue the verdict passed for the plaintiff without any point being reserved, and consequently the Court of Appeal has nothing to do with that issue.

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The only question before this Court is that stated in the rule which has been discharged, viz., whether the verdict should be entered for the defendant "on the ground that the plaintiff" (or rather the parties for whom the plaintiff made the insurance, and on whose behalf he sues), "being only interested as a re-insurer, was not entitled to recover on the policy sued on."

[* 40] * It is stated in the case that "the defendant gave in evidence, by the testimony of witnesses whose evidence was not contradicted, that in all cases of re-insurance policies the invariable practice has been to disclose the fact of the insurance being a re-insurance." Mr. Herschell argued on this as if it was a statement that it was the usage and custom of trade always to describe the interest in the policy as being a re-insurance; but we think the statement in the case does not bear that meaning. Re-insurance was in this country prohibited by statute 19 Geo. II., c. 37, s. 4, unless the assurer should be insolvent, become a bankrupt, or die; "in either of which cases such assurer, his executors, administrators, or assigns might make re-assurance to the amount of the sum before by him assured, provided it was expressed in the policy to be a re-assurance;" and this prohibition continued in force till as late as 1864;¹ so that there has not been sufficient time for a custom to spring up in this country, and there is no such custom in America, where re-insurance was always lawful: see Phillips on Insurance, chap. 5, s. 498, p. 270 (3rd ed.). Moreover, the evidence seems to have been directed to the issue found by the jury for the plaintiff, and has reference, not to the description in the policy, but to the practice of making a disclosure to the assurer.

The question, therefore, seems to us to be confined to this, whether, applying the ordinary principles of interpretation of written documents and the established rules of insurance law to this kind of insurance, the description in this policy is sufficient to cover it. The Court below decided that it was; and we are of opinion that their decision was right, and must be affirmed.

A description of the subject-matter of the insurance is required both from the nature of the contract and from the universal

¹ In 1864, by 27 & 28 Vict. c. 56, s. repealed by 30 & 31 Vict. c. 23, sch. D, 1. re-assurances on sea risks were made and also by 30 & 31 Vict. c. 59 (the Statute Law Revision Act, 1867).

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practice of insurers. It is generally described very concisely as being so much "on ship," "on goods," "on freight," "on profits on goods," "on advances on coolies," "on emigrant money," and many other examples might be given. And if no property which answers the description in the policy be at risk, the policy will not attach, * though the assured may have other property [* 41] at risk of equal or greater value. The reason being that the assurers have not entered into a contract to indemnify the assured for any loss on that other property.

Thus, a policy on "piece goods" will not make the insurer liable for a loss on "hats": *Hunter v. Prinsep*, Marshall on Insurance, 4th ed. p. 255.

In 1 Phillips on Insurance, chap. 5, s. 415, 3rd ed. p. 231, it is said: "It is necessary that the thing insured, and in some cases also the kind of interest intended to be protected, should be sufficiently set forth in the policy, or that the policy should at least prescribe the way of ascertaining to what the contract is to be applied." And this seems a fair statement of what is required, and is in strict accordance with what is said by Lord TENTERDEN in *Crowley v. Cohen*, 3 B. & Ad. at p. 485 (p. 314, *ante*), that, "although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large."

In some cases the nature of the interest in the thing insured is such as to vary the nature of the risk, and then it should be stated. In *MSwiney v. Royal Exchange Assurance*, 14 Q. B. 634; 19 L. J. Q. B. 222 (p. 279, *ante*), the policy was "on profit on rice." The Court of Queen's Bench held the plaintiff entitled to recover, but that judgment was reversed. The Court of Exchequer Chamber, in delivering judgment, say (14 Q. B. at p. 659; 19 L. J. Q. B. 226), "The first question discussed was whether the plaintiff had an insurable interest in profits on the rice. Under the circumstances stated in the special verdict, we feel no doubt that he had. He had entered into a binding contract with Drouhet & Co., by virtue of which he would have had a right to six thousand bags of rice delivered to him in England on the safe termination of the voyage of the *Edward Bilton* to England, with the whole of that quantity of rice on board, before the end of May; and he had made another contract to sell the rice in these events, by which contract he had secured a profit

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of 1s. 6d. per cwt. We have no doubt that the plaintiff might have recovered, in the events which have happened, a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover his special interest from the [* 42] time that the rice * was appropriated by the vendors and ready to be shipped at Madras, and also to insure him against losses of the expected profits, not merely by the loss of all the rice by perils of the seas, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated. If such an assurance had been made on this peculiar interest against all these events, it is obvious that the underwriters would have required a much larger premium for insuring so complicated a risk than for an ordinary insurance by an owner on goods or profit on goods, which would be liable to loss only by perils of the seas or other accidents happening to the goods themselves."

In all cases where the peculiar nature of the interest alters the risk, it may be properly said that such interest is the subject-matter of the insurance; and at all events there is great force in the argument that the nature of that interest should be stated. But in the case now before us, the nature of the interest of the parties assured in the cotton does not in the slightest degree vary the nature of the risk. Had the policy in this case been made by the plaintiff in the very same terms but on behalf of and to cover the interest of Tatman & Co., the owners of the cotton, the underwriters would have had to pay to the plaintiff the sum which would indemnify Tatman & Co. for any damage to the cotton from the perils insured against, and the plaintiff would have received that sum for the benefit of Tatman & Co. As the facts are, the persons on whose behalf the insurance is made have bound themselves to pay this sum to Tatman & Co., and the defendant is required to pay the same amount, and under precisely the same circumstances, to the plaintiff, but for the benefit, not of Tatman & Co., but of the parties on behalf of whom the plaintiff made the assurance. The subject-matter of insurance, viz., the cotton, is fully described, and there is no apparent reason which would make it just to require the nature of the interest to be described. Still, if there were a series of decisions determining that in such a case, or in cases analogous

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to it, a description was required beyond what would seem to us reasonable, we should be unwilling to disturb the established practice. But we do not find any such decisions.

* In *Glover v. Black*, 3 Burr. 1394, the plaintiff had lent [* 43] a sum of money on a bottomry bond, which is set out in the case at p. 1395. By the condition, if the ship arrived in the Thames, he was to be paid his loan with maritime interest, or if the ship should be utterly lost on the voyage, he was to be paid a just and proportionate average on all goods belonging to the obligor shipped at any time on the vessel, and not unavoidably lost. The plaintiff meant to insure his interest in the bond, and told the underwriters so; but by a blunder drew up the policy in the ordinary form of a policy on goods and merchandise. The underwriters were unconscientious enough to contest the policy, and Lord MANSFIELD very reluctantly decided in their favour. But it seems enough to state the nature of the plaintiff's interest to show that the real risk intended to be, but not described, was a very different one from that on goods, which is all that that case decided.

Lucena v. Craufurd, 2 Bos. & P. (N. R.) 269 (p. 151, *ante*), has always been treated as deciding that, though profits may be insured, they must be described as such, and we took time in this case, principally with a view to see what were the reasons for this decision, and whether they were applicable to such a case as the present.

We cannot find the reasons stated in the report of *Lucena v. Craufurd*, but in the first case of *Routh v. Thompson*, 11 East, 428 (10 R. R. 539), in which similar points arose soon after, Lord Ellenborough states them thus, at p. 433: "Independently, however, of the difficulty of fixing the value, and supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety? The declaration must aver an interest in the subject insured, and that interest must be proved: and how can it be said that these captors have any interest either in this ship or freight, when the ship is altogether the King's; the freight is altogether the King's; and the captors have no

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interest in either, nor other concern in respect to the same, [* 44] beyond a mere chance that the * King may be induced to give them something out of the produce of such ship and freight?"

This reasoning, whether binding as an authority or not, is clear and intelligible; but it seems to us to have no application to such a case as the present. The assured here had a direct interest in the safe arrival of the cotton: not in any way a collateral interest in something else after the cotton arrived. It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton; and if the mode in which they acquired that interest had been stated in the policy, it would have in no way altered the effect of the defendant's contract, which would still have remained a contract to indemnify against all damage sustained by the cotton in consequence of any of the perils insured against.

We think, therefore, that the judgment below should be affirmed.

Judgment affirmed.

ENGLISH NOTES.

Not only is it unnecessary that the interest should be described in the policy; but a policy may be validly effected on an interest the extent or existence of which is unknown to both parties at the time of effecting the policy, and is only ascertained, it may be, after the loss has become known.

An instructive case of this kind is *Gledstanes v. Royal Exchange Assurance Co.* (1864), 5 B. & S. 797, 34 L. J. Q. B. 30, 11 L. T. 305, 13 W. R. 71. The plaintiffs were the agents of a foreign insurance company — the Hong Kong Insurance Company — who were in the habit of insuring goods on voyages from Calcutta to London; and as they entered into contracts for insuring the goods before it was known by what vessel they should be shipped, and at the same time deemed it inexpedient to take upon themselves a risk greater than £5000, upon goods by any one ship, they were in the habit of insuring (by the plaintiffs as their agents) with the defendant Company the excess over £5000 of the risk which might be taken by their Calcutta agent upon goods in any one ship. These insurances were from time to time made by policies expressed as intended "to follow" a former policy which described the risk as follows: — "To cover the excess of £5000 which may be taken by the Calcutta agent of the Hong Kong Insur-

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ance Company on any one ship" — the ships being described as "first-class ship or ships as may be declared." On the 16th of March 1860, a telegram arrived in London reporting that a ship called the *Red Gauntlet* — a first-class ship bound from Calcutta to London — had been burnt and scuttled, but some cargo would be saved. This of course immediately became known to both plaintiffs and defendants, as persons engaged in marine insurance business. On the following day, the 17th of March, 1860, the plaintiffs declared the balance of the sums remaining on their open policies to be appropriated to goods on certain ships — none of these ships being the *Red Gauntlet*, which was not at that time known to have contained goods insured by the Hong Kong Insurance Company. On the 19th of March 1860, the plaintiffs effected a further policy "to follow" the series of policies before mentioned, "lost or not lost, at and from Calcutta to a port in the United Kingdom being on goods. Free of particular average unless stranded, sunk or burnt." On the 21st and 26th of March 1860, the plaintiffs received in due course from the Calcutta agent of the Hong Kong Company, advices that the Hong Kong Company had taken risks upon the cargo of the *Red Gauntlet* to the amount of £4738, in excess of £5000, and intimating that the insurances under their open policies were to be appropriated accordingly. The plaintiffs accordingly indorsed upon the policy of 19th of March 1860, a declaration that £4738 was appropriated to goods shipped by the *Red Gauntlet*, and gave notice of this to the defendants. The defendants disputed the right of the plaintiffs to make this appropriation. On an action being brought in the Queen's Bench to recover £2715, being the ascertained proportion of £4738 upon the partial loss which had occurred, the Court held that the claim was good. COCKBURN, Ch. J., adopted the argument of Mr. Lush on behalf of the plaintiff: — "The loss of the ship was not the risk insured against, the risk depending on the contingency that the plaintiffs' principals had insured goods on board that ship, and in excess of £5000. And whether this was the case or not was unknown to the plaintiffs and defendants at the time the policy was effected." He considered that the policy gave the right to the assured to appropriate goods in any ship, but it was to be declared to the assurers. It was clearly the intention of the contract that the risk should be insured between the time of the shipment and the declaration; and the declaration made in pursuance of instructions sent at the time of shipment, although made after the ascertainment of the fact of a loss, was in good time, otherwise the assured might be deprived of all advantage of the insurance. The rest of the Court substantially adopted the same view, and judgment was given for the plaintiff.

AMERICAN NOTES.

Both principal cases are cited in 1 Biddle on Insurance, sect. 131, the author remarking: "In all cases where the peculiar nature of the interest alters the character of the risk it may be properly said that such interest forms the subject-matter of the insurance, and at all events there is great force in the argument that the nature of that interest should be stated. Thus for instance, if profits are the subject of insurance, they should be described as such."

Failure of the insured to disclose the nature and extent of his interest in property insured will not avoid the policy, in absence of fraud. In *Morrison's Admr v. Tennessee M. & F. Ins. Co.*, 18 Missouri, 262; 59 Am. Dec. 299, the Court said: "An important principle is involved in the inquiry as to the duty of the owner in making disclosures of the nature, extent, and value of the interest in the property on which he seeks insurance against losses by fire. Any interest in property is insurable. But what is the duty of the owner of that interest who seeks insurance upon it? Should he minutely disclose his title and all the incumbrances on the property? Or should the insurer demand from him information in relation to these matters? There is no doubt that a fraudulent concealment or misrepresentation in regard to the owner's interest, to the prejudice of the underwriter, will avoid the policy. The views of the Supreme Court of the United States on this subject vary from those entertained by other tribunals whose reputation entitles their opinion to great respect. The summary of the argument of that Court is that the contract of insurance is one in which the underwriters generally act under the representations of the assured; consequently these representations should be fair, and omit nothing which is material for the underwriters to know. Every circumstance which would increase the risk or would induce a demand for a greater premium should be disclosed. Insurances against fire are usually made in the confidence that the assured will use all care to avoid the loss of the property which his interest can suggest. The extent of this interest must always influence the underwriter in taking or rejecting the insurance, and in estimating the premium. Hence it is necessary that he should be informed of the nature and extent of the interest for which an insurance is sought. Underwriters do not rely so much upon the principles of men as upon their interests. That the materiality of the facts concealed or of the representations made is a matter of fact for the jury, and cannot be determined as a matter of law by the Court. *Columbian Ins. Co. v. Lawrence*, 2 Peters, 25.

"This question was involved in the case of *Tyler v. Aetna Fire Ins. Co.*, 12 Wend. 507. There a vendee, under articles of agreement to purchase the insured premises, entered into possession with a considerable portion of the purchase-money unpaid. He insured the premises as his own, without disclosing the real nature of his interest in them. This was relied on as a material misrepresentation which avoided the policy, and the case of *Columbian Ins. v. Lawrence*, *supra*, was cited to show that the plaintiff could not recover. But the Court maintained that it had been deliberately settled in Massachusetts, as an established principle of the law of insurance, that a *bona*

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fide equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after inquiry of the true state of the property; and that the applicant need not represent the particular interest he has at the time, unless inquired of by the insurer; that the course of decisions had been upon this understanding of the law and in accordance with it, and such was apprehended to be the doctrine of the courts of England. *Lawrence v. Van Horne*, 1 Cai. 276; *Kenny v. Clarkson*, 1 Johns. 385 (3 Am. Dec. 336); *Murray v. Columbian Ins. Co.*, 11 id. 302; *Traders' Ins. Co. v. Robert*, 9 Wend. 409; Marsh. on Ins. 682, 683, 730; Phill. on Ins. 64, 94; that the nature and extent of the interest of the insured may in some instances be material facts in making up an estimate of the risk and rate of premium; and upon general principles applicable to this action a disclosure would seem to be required, but generally they cannot be so material as to justify a conclusion that they would have varied the premium paid. The necessity of disclosing the title of the applicant would greatly embarrass the operation of insurance, without affording any essential benefit to the insurers. Any error in the deduction or description of title might be fatal. The rights of the insurer are sufficiently guarded, by having it in his power to exact by inquiry a description of the interest of the applicant, and by the recovery being limited in case of loss to the value of the interest proved on the trial. The minuteness of the proposals and conditions as to the description required of property to be insured, without specifying or stating the extent of the interest, affords a reasonable inference that this information is not deemed generally material and indispensable.

“These views commend themselves to our judgment by their justness, and we are satisfied will effect more solid justice between the assured and the insurer than the contrary doctrine. It cannot have escaped observation that at first sight many of the principles of the law of insurance are seemingly very arbitrary, and their necessity and policy can only be seen and felt by those who are called upon to give them a practical application. The man without guile who asks for insurance on his property is not aware of the necessity of disclosures which long experience in insurance offices has shown to the underwriter to be necessary; and to hold his policy void for not making disclosures of the importance of which he is not aware would be gross injustice. If applicants for insurance are to be held to a strict representation and proof of the nature and extent of their interest in property on which they apply for insurance, they will almost invariably lose the benefit of their policies. Are the liens of taxes, judgments, and such like to avoid policies unless they are disclosed, when they may be entirely out of mind and forgotten? If, from a want of knowledge of the law, the assured mistakes the nature of his title, although he may have one equally valuable, is his policy to be avoided? It is no answer to say that the misrepresentation must be material. What is material must be determined from the circumstances of each case. What is material in one case may not be so in another, and so a wide field for litigation will be opened. The ends of justice will be best subserved by hold-

ing the assured only responsible for fraud. Insurance companies may protect themselves by inquiries in relation to these things, and after filling their policies with so much detail and such *minutiae* of information in regard to other matters as to create the impression that they are satisfied, to hold that they are not bound by their contracts, unless information of another kind is communicated by the assured, which is not sought for, would be enabling them to commit the rankest injustice."

"An applicant for insurance is not required to show the exact condition of his title unless requested so to do." *Hall v. Niagara F. Ins. Co.*, 93 Michigan, 184; 32 Am. St. Rep. 497.

To the same effect, see also *Hartford P. Ins. Co. v. Harmer*, 2 Ohio State, 452; 59 Am. Dec. 684; *Rohrbach v. Germania F. Ins. Co.*, 62 New York, 47; 20 Am. Rep. 451 ("his buildings," but insured had an interest less than ownership); *Little v. Phoenix Ins. Co.*, 123 Massachusetts, 380; 25 Am. Rep. 96 ("his household furniture"); *Merrill v. Agricultural Ins. Co.*, 73 New York, 452; 29 Am. Rep. 184 ("deed" does not imply a fee); *Riggs v. Com. M. Ins. Co.*, 125 New York, 7; 21 Am. St. Rep. 717; *Rochester Loan & B. Co. v. Liberty Ins. Co.*, 44 Nebraska, 537; 48 Am. St. Rep. 745.

The owner of an undivided fourth of a tract of unpartitioned land who is merely a life-tenant of the rest, to which his claim to ownership in fee is then in litigation, does not make a material misrepresentation by stating that he is the unconditional owner. *Kenton Ins. Co. v. Wigginton*, 89 Kentucky, 330; 7 Lawyers' Rep. Annotated, 81.

An equitable ownership is sufficient to warrant an insurance to one as owner. *Wainer v. Milford M. F. Ins. Co.*, 153 Massachusetts, 335; 11 Lawyers' Rep. Annotated, 598.

Profits must be insured as such. *Niblo v. N. Am. Fire Ins. Co.*, 1 Sandford (N. Y. Super. Ct.), 557.

In *Columbian Ins. Co. v. Lawrence*, *supra*, the insurance was on "their stone mill," but "the insured only held half of one-third, under a lease for three years renewable forever, and one-half of the other two-thirds as mortgagees; the other moiety was held under a contract, the terms of which had not been complied with, and which, if complied with, would give them a title to two-thirds of that moiety only as mortgagees." The Court was "of opinion that a precarious title depending for its continuance on events which might or might not happen is not such a title as is described in the offer for insurance, construing the words of that offer as they are fairly to be understood."

Reinsurance is a valid contract. *Merry v. Prince*, 2 Massachusetts, 176; *New York, &c. Ins. Co. v. Protection Union Ins. Co.*, 1 Story (U. S. Circ. Ct.), 458; *Bowery Ins. Co. v. Fire Ins. Co.*, 17 Wendell (N. Y.), 359.

No. 8. — Webster v. De Tastet, 7 T. R. 157. — Rule.

No. 8. — WEBSTER v. DE TASTET.

(1797.)

No. 9. — KING v. GLOVER.

(1806.)

RULE.

UNDER the rule of maritime law (which applied to British ships until the Merchant Shipping Act, 1854) that "freight is the mother of wages," a seaman could not insure his wages; but he had an insurable interest in, and could insure his kit.

But the rule did not apply to the master of the ship; who could insure his commission and privileges.

The law relating to the earning of wages is now altered by the modern Acts relating to merchant shipping (Merchant Shipping Act, 1854, ss. 183, 185; and now Merchant Shipping Act 1894, ss. 157, 158), and *quære* whether this alters the law as to insurance (see Arnould, 6th ed., p. 44).

Webster v. De Tastet.

7 Term Reports 157-158 (4 R. R. 402).

Insurance. — Seaman's Wages.

Where a mate of a ship or a sailor is to receive something at the end [157] of the voyage in lieu of wages, *e. g.* slaves, he cannot insure it; nor can he recover the value of such thing in an action against his agent for negligence in not procuring such an insurance.

The plaintiff, having been hired to go as a mate in a ship from the coast of Africa to the Havannah, for which he was to receive wages at the rate of £5 per month, and three privilege slaves free of expense on the ship's arriving at the port of sale, directed the defendant, who was his agent at Liverpool, to get an insurance on his privilege; and for the defendant's neglect the plaintiff brought this action on the case against him. It appeared at the trial at the last Lancaster Assizes before LAWRENCE, J., that the ship was lost on her voyage, and that the plaintiff thereby sustained a loss of £150,

No. 9. — King v. Glover, 2 Bos. & P. (N. R.) 206.

reckoning £39 5s. for his chest and clothes, and the rest for the value of the slaves. It was objected on behalf of the defendant, that the plaintiff could not recover the value of the slaves, because they were not the legal subject of insurance, they being in the nature of seamen's wages. That point was reserved for the opinion of this Court, a verdict being taken for the plaintiff for £150 with liberty to the defendant to move to reduce the damages to £39 5s. Accordingly,

Ward on a former day obtained a rule for that purpose, which was now opposed by

Holroyd, who admitted that if a policy had been effected the plaintiff could not have recovered the value of the privilege slaves in an action against the underwriters, but contended that, as in point of fact these kind of slaves were frequently the subject of insurance by mates at Liverpool, where the loss was always paid by the underwriters without disputing the question, the plaintiff might recover the value of them in this action, because by means [* 158] of * the defendant's negligence the plaintiff had sustained the loss. But

The Court were clearly of opinion that the slaves were not the subject of insurance, and that the plaintiff could not recover in this action more than he could have recovered in an action against the underwriters. They therefore made the rule absolute to reduce the damages to £39 5s. *Rule absolute.*

King v. Glover.

2 Bos. & P. (N. R.) 206-210 (9 R. R. 638).

Insurance. — Emoluments of Captain (or Mate).

[206] An insurance on the "commission, privileges," &c., of the captain of a ship in the African trade is legal.

This was an action by the plaintiff as widow and representative of her husband, Capt. Ch. King, who commanded the ship *John*, employed in the slave trade, and was commenced by her for the recovery of a loss upon a policy of insurance effected by her husband "on his commissions, privileges, &c., as may be hereafter valued." The insurance was "at and from Liverpool to the coast of Africa and African islands, and at and from thence to all ports and places of touching, discharge, sale, and final destination in the

No. 9. — *King v. Glover*, 2 Bos. & P. (N. R.) 206–208.

British and foreign West Indies, the Bahamas, and America, all or either, with liberty to exchange slaves and goods with any other vessel or vessels.” The plaintiff having obtained a verdict on this policy at the Guildhall Sittings after last Hilary Term, a rule was granted to the defendant in the ensuing term, calling on the plaintiff to show cause why that verdict should not be set aside, and a nonsuit or a new trial be *had. The rule [*207] was moved on several points, but the only objection which it is material to notice here was one made to the plaintiff’s recovery on the ground of the insurance being illegal and falling within the authority of *Webster v. De Tastet*, 7 T. R. 157 (p. 335, *ante*), as being on the captain’s “commissions, privileges, &c.” As to which description of interest it appeared that Capt. Ch. King, besides his wages, was entitled for his trouble and attention in purchasing slaves on the coast of Africa, and selling and disposing of them in the West Indies, to £2 per cent on the gross sales, and £4 for £110 after deducting the above £2 per cent and the other officers’ privileges, and commissions; and that this additional remuneration was the subject of the present insurance.

Shepherd and Bayley, Serjts., now showed cause and contended that the captain’s “commission and privileges” were not wages, but something in addition to wages, and consequently that such a remuneration to him for his extra trouble and attention in the management and disposal of the slaves was a good subject of insurance; they observed that he acted in the double capacity of captain and supercargo, for the former of which employments he received wages, for the latter this additional compensation; and that whatever doubt might be entertained as to his being allowed to insure in one character, there could be none as to his being entitled to insure in the other; that if a captain was not permitted to insure such an interest as this, he ought not to be permitted, when he happened to be a part owner, to insure his share in the ship, since he might be supposed to be likely to be more careless of the remaining interests in the ship when his own was insured; and yet no such objection could prevail in law to such an insurance; and that indeed no case had been cited to show that a captain of a ship could not insure his wages, though *the [*208] mariners, who stood in a different situation, were not permitted so to do.

Best, Serjt., in support of the rule, urged, in answer to the argu-

ment arising from the double capacity which the captain was supposed to fill, viz., that of captain and supercargo, that the plaintiff in his declaration alleged himself to have been "master of the said last-mentioned ship;" and that the "commission and privileges" were given to him, as wages were, only for doing his duty, and as such fell within the rule adopted in *Webster v. De Tastet*. He observed, that upon principle any disability to insure wages, or any forfeiture of wages on the ground of non-performance of the voyage, ought rather to attach to the captain than to the mariners; and insisted that this remuneration for the care and disposal of the slaves resembled that premium which had been held out by the legislature to captains concerned in the slave trade, in case they carried all or a proportionable part of the slaves safe to the port of delivery, and which premium, inasmuch as it was offered with a view to secure to the slaves kind and proper treatment during the passage, clearly could not be made the subject of an insurance without violating the policy of those laws by which so humane a provision was enacted.

Sir JAMES MANSFIELD, Ch. J. — The policy in this case is only against the perils of the sea; and therefore, if during the voyage all the slaves were to die, the captain would wholly lose his "commission and privileges," and would not be entitled to recover anything from the underwriters. If the policy were upon the health of the slaves, I think there would be considerable force in the objections last made. But this is a policy against the perils of the sea only, which is an answer to the objection [*209]. * When the case of *Webster v. De Tastet* was first cited to me at Nisi Prius it did not occur to me that there was any difference in the rule of law as applied to the captain of a ship and the mariners. But upon considering the two cases, both upon principle and in practice, there does appear to be a most material difference, and indeed the chief pay of captains in many trades, as, for instance, the East India trade, being the privilege of carrying out investments to the settlement to which they are bound, and there making the best advantage of them in their power, it would be absurd to say that such investments were not the subject of a legal insurance. My Brother MARSHALL, in his book (p. 73, vol. I.), when treating this subject, does not seem to have imagined that the prohibition as to insurance of wages extended to the captain as well as the seamen; for he commences his

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observations by these words, "to prevent the desertion of seamen." So the 8 Geo. I., c. 27, was passed to prevent masters paying *seamen* above one moiety of their wages due to them beyond the seas. Indeed the regulation is founded altogether on the marine law, which does not allow the mariners any wages unless the ship earn freight, and which law could be completely evaded if the mariners could insure their wages. Considering, therefore, that a clear distinction exists in law with respect to the insurance of wages between the captain and the mariners, it is not necessary to discuss the effect which would result from the facts of this case as establishing the captain to have acted in the double character of captain and supercargo.

ROOKE, J. — I am of the same opinion. This policy being against the perils of the sea and capture, and not against the loss of the slaves by death during the voyage, no objection arises to it as contravening the policy of the laws passed to secure proper care and attention to the *slaves. The captain's [* 210] "commission and privileges," therefore, appear to me to be the subject of a legal insurance.

CHAMBRE, J. — The common law follows the marine law in not allowing wages to be due till the safe arrival of the ship. This rule applies to the mariners, but there is no decision in the marine law prohibiting the captain from recovering his wages up to the time his ship is captured. Indeed the captain and the mariners are treated as very different subjects of consideration in the marine law; the former are supposed to be persons of trust and confidence with the owners, and to be bound to them by the terms of their contract, nor is there any fear that they will run away or desert; and so far is the idea of personal trust and confidence between the owners and the master carried that the latter has not, as the mariners have, the choice of proceeding against the ship in the Admiralty or suing at law, but must pursue his remedy at law; moreover he is considered *quasi* owner himself, and liable to be tried. Indeed, considering that the captain may pay himself, if he has money in hand, it is probable that we should have many cases in the books of actions to recover back money retained by captains for wages due before capture, if their payment depended, like that of the mariners, on the safe arrival of the ship. This insurance, therefore, appears to me to be legal. *Rule discharged.*

ENGLISH NOTES.

The case of *King v. Glover* was followed, in 1856, by the Queen's Bench in *Hawkins v. Twizell*, 5 El. & Bl. 883, 25 L. J. Q. B. 160; in which the question directly arose whether the rule that "freight is the mother of wages" applied to the case of the master of the ship as well as the crew. The circumstances out of which the case arose were in 1853, so that it was not in any way affected by the provisions of the Merchant Shipping Act 1854. The Court held that the rule did not apply; and the wages of the master, who had been engaged for the voyage at £10 per month, were due to his representatives for the period up to the loss of the vessel with all hands.

The sections of the Merchant Shipping Act 1894 (57 & 58 Vict., c. 60, ss. 157, 158), which replace and are substantially to the same effect as sections 183, 185, of the Act of 1854, are as follows:—

"Section 157. (1) The right to wages shall not depend on the earning of freight; and every seaman and apprentice who would be entitled to demand and recover any wages, if the ship in which he has served had earned freight, shall, subject to all other rules of law and conditions applicable to the case, be entitled to demand and recover the same, notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship, proof that the seaman has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim to wages.

"(2) Where a seaman or apprentice who would, but for death, be entitled by virtue of this section to demand and recover any wages, dies before the wages are paid, they shall be paid, and applied in manner provided by this Act with respect to the wages of a seaman who dies during a voyage.

"158. Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

The following observations have appeared in the 3rd and subsequent editions of Arnould on Marine Insurance, and it is stated in a note to the 6th edition (1887), that they were made with the intention of drawing attention to the subject, with the hope that the right of insuring wages might be recognised by legislative enactment:—

"Are a seaman's wages now insurable? The old law barred all claim to wages against the owner in case of intermediate loss of the ship, and the conventional doctrine of their non-insurability followed

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from this as a consequence simply. The repeal of the rule then ought to carry with it the consequence. If now the seaman's title, under the new law, to wages up to the time of the loss, operates no prejudice to the ship while she exists, it is not likely to be a whit more prejudicial to the owner's interests, when the ship no longer exists, for the seaman to have a claim against the underwriter to wages for the remainder of the voyage. The master always might insure his wages; but, until the Act of 1854 gave it him, he had no lien for them on either ship or freight; the loss of either or both did not entail on him the loss of his wages. Now, however, that he is in the same position as the seaman in respect of lien, it is still the received doctrine that his wages are insurable. Then why not the seaman's? But there is no decision to this effect since 1854, and no decision, we believe, to the contrary; although there is a notion in the profession that these wages are not insurable."

AMERICAN NOTES.

A ship-master's commissions are insurable as "property." *Holbrook v. Brown*, 2 Massachusetts, 280. So of a supercargo who was to receive a gross sum in lieu of commissions. *Robinson v. N. Y. Ins. Co.*, 2 Caines (New York), 357; 1 Johnson, 616.

King v. Glover is cited with approval in *Providence W. Ins. Co. v. Bowring*, 1 United States Appeals, 199.

As to insurability of seamen's wages, the nearest approach to an adjudication seems to be in *Hancox v. Fishing Ins. Co.*, 3 Sumner (U. S. Circ. Ct.), 132, where STORY, J., "desired to be understood as giving no opinion." This case is cited in 1 Parsons Marine Insurance, p. 235, to the doctrine that one may have an insurable interest in a seaman's wages, although they themselves may not be insured.

No. 10. — COUSINS *v.* NANTES.(ERROR FROM NANTES *v.* THOMPSON.)

(EX. CH. 1811.)

RULE.

A WAGERING policy on a foreign ship and cargo (which by English law is not illegal although such a contract would seem to be void as a wager under 8 & 9 Vict. c. 109) is a contract of a kind altogether distinct from a policy on interest.

No. 10. — *Cousins v. Nantes*, 3 Taunt. 513, 514.

If a policy be in the common form, it is a policy on interest, and the assured, in order to recover, must aver and prove his interest.

Cousins v. Nantes.

3 Taunton, 513-524 (12 R. R. 696).

Insurance. — Wagering Policy. — Policy on Interest. — Pleading.

[513] A wagering policy and a policy on interest, are contracts distinct in their nature and incidents.

It must appear on the face of the policy of which species the contract is.

If the policy be in the common form, it is a policy on interest.

If it be a policy on interest, the declaration must aver in whom the interest is vested.

The plaintiff below declared upon a policy whereby the plaintiff below and R. M. French did, as well in their own name, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain, in part or in all, cause themselves, and them, and every of them to be insured, lost or not lost, at and from Elsineur to Ferrol, Cadiz, and Carthagea, upon the ship called the *Hoop*, valued at £1460. The plaintiff averred, amongst other matters, that the ship *Hoop* was not at the time of effecting the policy, or at the time of the happening of the loss thereafter mentioned, or at any other time whatsoever, the property of, nor belonging to His Majesty the King of Great Britain, or of any of his subjects. And that the plaintiff below, together with R. M. French, were the persons who gave the orders to the agent immediately employed to effect that policy, and alleged a loss by arrest by order of His Majesty, and condemnation in the Court of Admiralty. The defendant below demurred, and assigned for causes, that it was not alleged, nor did it appear by the first count of the declaration, for whose use or benefit, or on whose account, the policy was made, and also for that it was not therein alleged to whom the ship in that count mentioned did appertain in part or in all, or what person or persons were interested or concerned in the insurance effected thereon by that policy: and also for that it was not alleged, nor did it appear, that the assureds, or either of them, or any other person or persons whatsoever, had any interest, property, or concern in the ship or insurance; and also that it was *alleged

No. 10. — *Cousins v. Nantes*, 3 Taunt. 514, 515.

that the ship became wholly lost to the assureds, and to every other person to whom the same did or might appertain in part or in all; but it was not alleged, nor did it appear with sufficient certainty by the declaration, to whom, or to what other person or persons besides the assureds, the ship became wholly lost, and that it appeared by the declaration that the action in that respect was brought for the use of the plaintiff below as the survivor of R. M. French, and also of every other person to whom the ship did or might appertain in part or in all, but it was not alleged, nor did it appear by the declaration, and with sufficient certainty, to how many and what other persons the ship did appertain in part or in all. The Court of King's Bench in Easter Term, 1802, gave judgment upon this demurrer for the plaintiff below. See *Nantes v. Thompson*, 2 East, 385 (6 R. R. 458).

The defendant below brought error, and assigned the general error; and the case was thrice argued, twice before the reporter began to take notes in this Court, *viz.*, the first time by GILES for the plaintiff in error, and PULLER for the defendant in error, in Hilary Term, 1804; the second time by GIBBS for the plaintiff in error, and PARK for the defendant in error, in the Easter Term following. The judgment stood over, as it was understood, until the decision of the House of Lords in the case of *Lucena v. Craufurd*, on the first writ of error: 2 Bos. & P. (N. R.) 269 (p. 159, *ante*). A third argument was in Trinity Term, 1809, directed by the Court: and the case was in Michaelmas Term, 1809, argued by

R. Carr for the plaintiff in error; who stated that the defendant in error had on the former arguments made two points: first, that it was lawful at common law to effect an insurance without interest; secondly, that since the statute 19 Geo. II., c.

37, it was not necessary *to aver an interest. Carr com- [* 515] bated the first proposition, and mainly relied upon the judgment given by Lord ELDON, Lord ELLENBOROUGH, Ch. J., and Lord ERSKINE, Chancellor, in the case of *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 315 (p. 187, *ante*). He also referred to *De Paiba v. Ludlow*, Comyn, 360. [The Court, after directing the counsel to withdraw, declared that the only question in *Lucena v. Craufurd* was, whether the count, which was penned in a peculiar way, contained such an averment of interest as would support the judgment of the Court below; therefore the judgment on the principal point in that case did not at all affect the present question.

but that the Court considered it to have been by that case solemnly determined, without even a difference of opinion among the Judges, that at common law, wager policies, or insurances without interest, were lawful; and that it was impossible to say that any wager which was not (as it was said) contrary to the policy of the law, that is, contrary to morality, or hurtful in a political point of view, was not a legal contract. Therefore the argument for the plaintiff in error might be confined to the second point, that the persons to whom the interest belonged should appear on the policy.] Carr then contended that the declaration was bad, because the contract which it was intended to describe was a policy upon an interest, and, that being so, it was necessary that the plaintiff should state upon the face of his declaration where that interest resided. If he had meant this insurance to be an insurance without interest, he should have so described it in his contract. But this policy neither contains words dispensing with the proof of interest, nor averring that the assured had no interest, nor averring that the ship is a foreign ship. It must therefore be taken to be an insurance on interest, which is the most ordinary class of insurances. All writers define an insurance as a contract of indemnity: every insurance must * therefore be presumed to be such unless expressly distinguished. In the case of *Nantes v. Thompson* it was proposed to avoid the difficulty by inserting in policies the words "on interest"; but that expedient was never yet practised. If, therefore, every policy made in the common form is and purports to be an insurance on interest, the assured under such a policy would, if he had no interest, be entitled to a return of premium, as well before as since the statute 19 Geo. II. c. 37. There is no other ground upon which a return of premium in such a case can be accounted for; but it appears from the cases that before that statute a plaintiff was entitled, on failure of interest, to a return of premium, which could not have been if his policy described an insurance without interest. *Martin v. Sitwell*, 1 Shower, 156. [MANSFIELD, Ch. J. Upon an insurance made on "interest or no interest," the premium cannot be recovered back on account of the want of interest, because the question of interest has nothing to do with it. No doubt, if a policy purports to be made upon an interest, and it turns out that no interest exists, that policy is void, and the premium must be recovered back.] If this were otherwise, it

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would have been wholly unnecessary, before the statute, to have averred an interest, yet all the precedents, before the statute, either contain a dispensation of the proof of interest, or aver interest; and since the statute they have uniformly averred it on policies on foreign ships, until the declaration in *Craufurd v. Hunter*, which was the first instance to the contrary. *Goram v. Sweeting*, 2 Saund. 200, which was relied on as an instance to the contrary, has a stipulation that the ship should be "valued at £300, without any further account to be rendered for the same," which means without further account of interest. *Vidian*, 26 & 48. Precedents in Upper Bench, 1653. A manuscript precedent of Serjeant Poole's. *Goslin v. Thorpe*, in 1741. *Blake v. Duncalfe*, in 1731, *ibid.*, and several other manuscript precedents, are cited in *Craufurd v. Hunter*, 8 T.

R. 18 (4 R. R. 576). The adjudged cases are *Goddard v. Garrett*, 2 Vern. 269, which was a bill to have a policy delivered up, upon the ground that the assured had no interest in the ship or cargo. The Court said, the law is settled that if a man has no interest, and insures, the insurance is void, although it be expressed, in the policy, "interested, or not interested." This shows the necessity of the averment, for though a policy without interest was a contract to which the law would give effect, it was one which the Courts of Equity would not permit to be enforced. [MANSFIELD, Ch. J. The Courts of Equity formerly exercised an odd jurisdiction upon the subject; but they could not have proceeded upon the ground that an agreement was good on one side of Westminster Hall, and not on the other.] Lord ELDON, in his judgment, refers to *De Paiba v. Ludlow*, and other cases, where it is said that the effect of the Act was merely to change the form of the policy. Lord ELDON considers that those words affected merely the proof, and not the legality of the contract. [MANSFIELD, Ch. J. It is a part of the contract if the insurance be "interest or no interest:" it has nothing to do with the proof: Lord ELDON states that if the insurer having admitted an interest, which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a Court of Equity that he had been taken by surprise in his admission, and the policy would be ordered to be delivered up. He is contemplating policies which are good at law; but how that could be done except upon cases of fraud, or other external circumstances, I am at a loss to conceive, except in a few cases where

the defendant's proof might have been lost.] If it be not a policy upon interest, there can be no partial loss, no abandonment, no return of premium. If it be a policy upon interest, it [* 518] is necessary to aver and to * prove in whom that interest is vested, and a variance therein is fatal. The statute says nothing respecting the averment of interest, it only says that policies containing certain words, interest or no interest, shall be void. The argument would go to this length, that it was absolutely unnecessary to aver interest in declaring on any policy before the statute, and on any policy on a foreign ship since. If a man having no interest makes a policy in the common form, without apprizing the assured that he has no interest, he commits a fraud, by persuading the other to enter into a contract possessing incidents which do not belong to his real situation.

PULLER for the defendant in error. The question, as now narrowed, is merely this, whether since the statute 19 Geo. II. c. 37, a policy can be effected on a foreign ship without notifying to the underwriters that the ship is foreign? For since wagering policies were legal before that statute, and since that statute leaves the case of foreign vessels untouched, it is impossible that it should render a new averment necessary with respect to them which was not necessary before. [MANSFIELD, Ch. J. That is not contended for, but that it was always necessary to state something on the face of the contract to show that it was a wagering policy.] In *Lucena v. Craufurd* most of the Judges said (2 Bos. & P. (N. R.) p. 308, p. 182, *ante*) that before the statute it had been most usual to aver interest, but that precedents without it were to be found, and that such an averment was not essential to maintain a declaration upon the policy; it was sufficient to show, in the case of a policy upon interest, that a real loss had been *bonâ fide* sustained. [MANSFIELD, Ch. J. They were there speaking of a common policy.] If, on a common policy, it was not necessary before the statute, there is no reason why it should be [* 519] necessary in this case, which by the particular * form of the averment is made still stronger than the ordinary case. Lord ELDON says, that in the case of a foreign ship the averment of interest is dispensed with on account of the difficulty of proof. But this judgment in *Lucena v. Craufurd* would deliver the defendant in error from the necessity of such an averment, even if this were not a foreign ship. *Martin v. Sitwell* appears

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to have been an insurance on goods, and there were no goods put on board, so that the policy never attached. In *Goram v. Sweeting* there is no averment of interest, nor does "account" mean proof of interest, but proof of value, and, as GROSE, J., observed, in *Nantes v. Thompson*, 2 East, 392 (6 R. R. 463), "that could not, according to any rule of pleading, dispense with the necessity of averring an interest, if without such averment there could be no breach of the defendant's undertaking." The only allegation in *Goram v. Sweeting*, from which interest could be inferred, is, that the ship was lost, and that the plaintiff abandoned *totum interesse suum*. But if this were introduced as an averment of interest, it would be clearly demurrable. It is held in *Lucena v. Craufurd* that an allegation of interest is unnecessary. In Clift Ent. 77, is a declaration without any allegation of interest: it is quite clear the statute did not make any new averment necessary, for it only prohibited that which had been usual before, and excepted out of the prohibition the case of foreign ships. The Court of King's Bench said, "every man can ask whether the ship he insures is foreign or English." Is it to be presumed, when I state on my count that the ship is not English, that it was not disclosed to the underwriters that she was foreign? [MANSFIELD, Ch. J. The objection is not that the interest is not alleged in the declaration, for enough is said there to show that the plaintiff meant to avail himself of her being a foreign ship; but it is contended that it must be shown on the policy, whether *she [* 520] was a foreign or English ship.] None of the policies stated in any of the precedents of declarations notice the ship as being foreign, nor do they notice any part of such a contract as might dispense with it. If, then, before the statute, interest or want of interest was not distinguishable on the policy, then this, which is the excepted case of a foreign ship, must now stand on the same ground as all cases did before the statute. [HEATH, J. Why may not you insure a foreign ship, interest or no interest, and refer it to the event to see in what manner you shall declare, and what shall be the relative rights arising out of the policy?] The contract would be binding on the parties to adopt the situation in which they stood at the time of making the contract, with all its incidents. [MANSFIELD, Ch. J. Nothing is said in the statute about the form of the policy, nor about the averment of interest. The only use of an averment of interest is to inform the

defendant, with sufficient certainty, in whom the plaintiff means to insist that the interest is. It is equally a valid and legal contract, in whomsoever the interest may appear: it is a mere question of form: nothing arises here on defect of evidence. WOOD, B. It is all reducible to this; if the nature of the contract includes a warranty that the assured has an interest, then interest must be averred in the declaration.] The majority of the Judges decided that the statute of Geo. II. only prohibits forming a contract to dispense with proof of interest at the trial. If it was necessary for the plaintiff below to prove interest at the trial, and if he failed to do it, the objection was to the verdict then; but it does not necessarily follow that because the plaintiff below did not then prove interest, it is therefore a good objection now that he did not aver it. This averment authorized him to prove at the trial that the ship neither belonged to His Majesty nor to [* 521] any of his subjects, therefore it must necessarily * have been foreign. [MANSFIELD, Ch. J. Looking at this policy, I think there is great weight in what the counsel for the defendant in error has urged, that in *Lucena v. Craufurd* the Judges held that an averment of interest was unnecessary. For what are the words of the policy? He causes himself to be insured; it imports the thing insured to be his, otherwise how can he be insured, except in wager policies? This, then, is only necessary to be proved at the trial: if it be not proved at the trial that there is a real interest, there must be a nonsuit; but that does not touch the question whether an averment of interest is necessary.]

Carr in reply. The argument of the plaintiff in error has been misunderstood. It is this, that if the plaintiff below meant to insist upon an insurance without interest, he must show it on the policy. [MANSFIELD, Ch. J. You urge, and with truth, that a policy in the common form is a contract of indemnity, as in form it is: if so, and inasmuch as every contract of indemnity is a contract founded on interest, in stating that contract the interest appears; and why is it necessary to allege it again? If the plaintiff does not prove his interest at trial, he is gone, but it is unnecessary to aver the interest twice. The question certainly goes to this, whether it is in any case necessary to aver interest, even in a British ship.] The whole practice, since the statute, is contrary to that proposition, though two or three precedents may be found before it without an allegation of interest or dis-

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pensation of it; but *Goram v. Sweeting* is not one of them. It is equally necessary for the defendant to be told in whom the interest will be contended to be, as for him to know whether any interest exists. It is not necessary that all policies upon foreign ships should be with interest or no interest, but if it is meant for a gaming policy, let the parties declare it; if for a *contract of indemnity, let that purpose be expressed. [* 522] [MANSFIELD, Ch. J. The argument has mixed a great deal with the necessity of the averment of interest before the statute; but the single question here is, whether it was necessary to show on the policy that this was a gaming policy.]

Cur. adv. vult.

MANSFIELD, Ch. J., on this day delivered the judgment of the Court.

It was impossible for the Court below to decide this case otherwise than they did while their decision in *Craufurd v. Hunter* stood. The single question is whether, on a policy such as this is, the averment contained in this declaration is sufficient to maintain the action? The policy is in the common form, without anything in it leading any one to suppose that it was otherwise than an ordinary policy. It is alleged that the ship became wholly lost to every person interested, but there is no allegation of interest in any person in the declaration. The authority of *Craufurd v. Hunter* has been much shaken since; in the case of *Craufurd v. Lucena* the verdict was taken in such a way as not to include the count in which no interest was alleged; counsel of great eminence avoided it, which shows they thought it doubtful. The case of *Goram v. Sweeting*, in Saunders, was much talked of, and there is in the declaration in that case no averment of interest: Saunders was counsel for the defendant, and was astute enough to have taken the objection if it had been tenable. Some entries are to be found without any allegation of interest; but those found with it are stronger authorities; for no one would incur himself with such allegation if he could avoid it. Wager policies at last came to be legal, nobody knows how, contrary to common sense; at most it only proves the opinion of the persons then in the *habit of drawing declarations, who were [* 523] not, as now, counsel in the causes, but officers of the Court, viz., the prothonotaries of the Court of Common Pleas;

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one cannot see why such an allegation should find its way into a declaration, unless necessary. With respect to the true nature of the contract of indemnity, it has been argued, that if there be no interest, no loss can happen; every word in the policy shows that it was an instrument to protect merchants; the words at the beginning of the declaration are, "according to the usage and custom of merchants"; it is not the usage and custom of merchants to gamble. If this be so, every policy must be taken to be on interest, unless something be stated, showing the contrary. In this policy, there is nothing showing that it was not on interest. If it be admitted, as it is, that interest must be proved at the trial, it must be alleged also, that the defendant may be prepared at the trial to meet it. This policy must be taken to be on interest; to support an action on a wagering policy, something must appear to show that it is such. The preamble of the statute 19 Geo. II. c. 37, recites that the making assurances, interest or no interest, or without further proof of interest than the policy, had been found pernicious, from whence it seems as if, before that Act, all policies were on interest or no interest, or without further proof of interest than the policy: it is true that the Act goes on, when enacting, to use the same words, and adds, "or by way of gaming or wagering, or without benefit of salvage to the assurer." The language of this Act seems strongly to prove that before it passed it was usual to put in policies the words "interest or no interest," or some other words, in order to show that it was a wagering policy; and, to be sure, unless there were words to distinguish wagering from other policies, there would be a great disadvantage to the underwriters. On a wagering [* 524] * policy, there is no salvage, no abandonment, no return of premium for short interest; it is the interest of the insured that the ship should be lost; but it is the contrary on a policy on interest; there is salvage, there is an abandonment, there is a return of premium for short interest; there it is usually the interest of the merchant to labour for the safety of the vessel. Consequently it is absolutely necessary, in order to give the underwriter a fair advantage, that he should know it is a wagering policy. In this declaration it is alleged that the ship did not belong to the King, or any of his subjects: this was intended to supply the necessity of words tending to show it was a wagering policy. But it is not enough to show these circumstances in the

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declaration; if they are not shown in the contract, it is necessary that it should be inserted in the contract whether the policy is a wagering policy or not. This, then, is not a wagering policy, but an ordinary policy, made for the purpose of indemnifying the person insured, and there is no declaration upon such a policy in any case since the statute 19 Geo. II., c. 37, of which I am aware, except that of *Craufurd v. Hunter*, wherein the allegation of interest has been omitted. Upon such a policy, therefore, we are of opinion, according to the practice of sixty years, since the statute, that it is necessary to allege the interest in the declaration, in order that the defendant may see what that interest is, and in whom it is; for it is very necessary that the plaintiff should know what interest is intended to be relied on, because he may, by disproving it, in many cases defeat the action. We therefore think that on this declaration the plaintiff in the Court below ought not to have recovered. *Judgment reversed.*

ENGLISH NOTES.

Before the Marine Insurance Act 1745 (19 Geo. II., c. 37) it appears to have been established that a wagering policy, clearly expressed to be such, was valid. See *Assiviedo v. Cambridge* (1710), 10 Mod. 77, and other cases mentioned in note to Arnould's Insurance, 6th ed. p. 123. The Act of 19 Geo. II., on the preamble that such insurances were hurtful to trade and navigation, enacted that after the 1st of August, 1746, "no assurance or assurances shall be made by any person or persons, bodies corporate or politick, on any ship or ships belonging to His Majesty, or any of his subjects, or on any goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes."

As the Act did not apply to foreign ships, or goods on board foreign ships, wager policies on such ships or goods remained lawful. But, as was conclusively determined by the principal case, the wagering nature of the contract must be clearly expressed; otherwise interest must be averred and proved.

But as all contracts by way of gaming or wagering are made null and void by the Gaming Act 1845 (8 & 9 Vict. c. 109, s. 18); and by the Gaming Act 1892 (55 & 56 Vict. c. 9) the nullity is extended to any promise express or implied to pay any person any money paid by him under or in respect of such a contract, or to pay any money by way of

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commission fee or reward or otherwise in respect of any such contract; — it seems that wagering policies upon foreign ships or goods on board them would (as English contracts) be invalid like all other wagering contracts. There is indeed an Irish case, decided on demurrer, in which it was held that the Act 19 Geo. II. did not extend to Ireland, and that a contract for insurance of French goods “without proof of interest, &c.,” was held to be not *ex facie* invalid as an Irish policy: *Keith v. The Protection Marine Insurance Co. of Paris* (1882), 10 L. R. Ir. 51. But the Gaming Act 1845 was not referred to in argument; and assuming the decision to have been right, and that the words “without proof of interest” did not necessarily make the policy a gaming contract, it does not follow that the plaintiff could have got a judgment without proving interest at the trial.

The following have been held void as wagering contracts under the Marine Insurance Act 1845: — One passenger in consideration of £20 to be paid by another passenger in the same ship agreed with the latter to pay him £1000 upon the ship returning to England in case she did not save her China passage that season. The ship being delayed between the Cape and Madras, did lose her passage that season. On an action to recover the £1000, it appeared that the plaintiff had some goods on board which were liable to suffer from the loss of the season. Lord MANSFIELD held that the contract was substantially a wager, and void within the Act of 1745: *Kent v. Bird*, 2 Cowp. 583.

In *Lowry v. Bourdieu* (1780), 2 Dougl. 468, the insurance was expressed in the ordinary form of a policy on ship and goods for a voyage, adding the words “valued at £26,000, being the amount of Captain Patrick Lawson’s bond,” &c. “and in case of loss, no other proof of interest to be required than the exhibition of the said bond.” At the head of the subscription was written, “On a bond as above expressed.” It did not appear that the insured had any interest in the ship or goods. After the ship’s safe arrival the insured brought his action for a return of the premium, on the ground that, the policy being without interest, the contract was void. Lord MANSFIELD held that the policy was a gaming policy and prohibited by the Act of 1745; and, both parties being equally guilty of a breach of the law the maxim *melior est conditio possidentis* applied and directed a verdict for the defendant. On motion for a new trial the direction was sustained by the Court (Lord MANSFIELD, WILLES, J., ASHHURST, J., and BULLER, J.). Lord MANSFIELD said, “There are two sorts of policies of insurance: mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity,

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because there is no interest upon which a loss can accrue. They are mere games of hazard; like the cast of a die. In the present case the nature of the insurance is known to both parties. The plaintiffs say 'We mean to game; but we give our reason for it; Captain Lawson owes us a sum of money, and we want to be secure in case he should not be in a situation to pay us.' It was a hedge. But they had no interest; for, if the ship had been lost, and the underwriters had paid, still the plaintiffs would have been entitled to recover the amount of the bond from Lawson."

Money expended in reclaiming a cargo on board a ship captured was insured by the owners of the cargo upon the event of the ship's arrival at Marseilles. In an action to recover the policy money the plaintiffs failed for the reason (*inter alia*) stated by Lord MANSFIELD, Ch. J., as follows:— "The interest on which the plaintiffs effected this policy was money laid out in reclaiming the cargo. The event insured by the policy was the arrival of the ship at Marseilles. If she did not arrive, then the money was to be paid; if she did, there was an end of the insurance. . . . This is a wagering policy, and it is the just the same as if the event insured had been the arrival of any other ship at Marseilles. The loss or safe arrival of the ship did not alter the security. The parties were interested in the cargo alone, but the event insured was the arrival of the ship, and not of the cargo." *Kulen Kemp v. Vigne* (1786), 1 T. R. 304, 1 R. R. 205.

A policy of insurance as set forth in the declaration stipulated "that the goods insured were and should be valued at five tierces coffee, valued at £27 per tierce, say £135; that policy to be deemed sufficient proof of interest." This was construed to mean that the policy dispensed with all proof of interest, and not merely of proving the value: and a judgment in favour of the plaintiff was arrested accordingly: *Murphy v. Bell* (1828), 4 Bing. 567, 29 R. R. 630.

AMERICAN NOTES.

The general rule in this country, either by statute or by decision, is that a wager policy is void. At an early day, in *Amory v. Gilman*, 2 Massachusetts, 1, it was doubted that such contracts could be supported, and KENT, Ch. J., in *Mount v. Waite*, 7 Johnson (New York), 434, declared that "a wager contract is void if it be against the principles of public policy, equally as if it contravened a positive law." The Massachusetts Court, in *Lord v. Dall*, 12 Massachusetts, 115; 7 Am. Dec. 38, declared such a policy void. So in New Hampshire, *Hoit v. Hodge*, 6 New Hampshire, 104; 25 Am. Dec. 451, and in Vermont, *Collamer v. Day*, 2 Vermont, 144. In *Pritchett v. Ins. Co. of N. A.*, 3 Yeates (Penn.), 458, it was said: "A policy made without interest is a wager policy, and has nothing in common with insurance but name and form. It is not subservient to the true interests of fair trade and commerce, but is

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pregnant with as much mischief, both public and private, as can proceed from any species of gaming which the legislature has hitherto found it necessary to repress."

May says (1 Insurance, sect. 74): "Under the influence of a healthy public sentiment they" (courts) "have become impatient of investigating disputes founded upon any species of gambling, and almost without exception refuse to enforce a contract supported by such a subject-matter."

In *Ruse v. Mut. Ben. L. Ins. Co.*, 23 New York, 516, it was held that at common law a wager life policy was void. SELDEN, J., observed: "A policy obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are at common law valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong?"

"Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against. In respect to insurances against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void, even at common law. It was so held in England, at an early day, by Lord Chancellor KING, in *Lynch v. Daltzell* (4 Bro. P. C. 431), and by Lord HARDWICKE in *Sadler's Co. v. Badcock* (2 Atk. 557); and the courts in this country have generally acquiesced in and approved of the doctrine. In this State such policies would fall under the condemnation of our statute avoiding all wagers and gambling contracts of every sort; but they would no doubt also be held void, independently of that statute, at common law. In *Howard v. Albany Ins. Co.* (3 Denio, N. Y. Sup. Ct. 301), BRONSON, Ch. J., asserted the necessity of an interest in the assured in all such cases, referring in support of the doctrine, not to the statute, but to the decisions of the Lord Chancellors KING and HARDWICKE (*supra*).

"In regard, however, to marine insurances, a different rule seems to have prevailed in England; and the cases of *Clendining v. Church* (3 Caines, 141), *Juhel v. Church* (2 Johns. Cas. 333), and *Buchanan v. Ocean Ins. Co.* (6 Cow. 318), are supposed to have established the same rule in this State. No reason that I am aware of has ever been given for this difference between fire and marine policies. The latter, when of a wagering character, are vicious and evil in their tendencies as well as the former, and have been generally considered as noxious and dangerous whenever the question has arisen. They should therefore, as it would seem, for the reasons applied to policies against fire, have been held void, as contrary to public policy.

"The distinction between these two classes of policies, is in my view a mere matter of accident, and grew out of the peculiar manner in which the question was presented in respect to marine policies. The case of *De Paiba v. Ludlow* (Comyn), shows how the doctrine that wagering policies upon ships are valid, originated. The defendant there had insured the plaintiff, 'interest or no interest.' On the trial it was objected that the plaintiff could not recover, unless he had a property in the ship; but the Court said that the

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insurance was good, and that the import of the clause 'interest or no interest' was that the plaintiff had no occasion to prove his interest. Had the question been directly presented in this case, whether a mere wagering policy was valid, the decision would, I think, have been different. The case itself shows the Court to have supposed that the plaintiff actually had an interest; and it is apparent, from the authorities, that it had always been previously held, in suits upon policies not containing the words 'interest or no interest,' or other equivalent words, that the plaintiff must aver and prove that he had an interest. This is distinctly asserted by Lord HARDWICKE, in the case of *Sudler's Co. v. Badcock* (*supra*); and in the case of *Craufurd v. Hunter* (8 T. R. 14), the counsel, in looking into the precedents at the request of the Court, found that it had been the uniform practice, in suits upon marine policies, to insert an averment of interest. To me therefore it seems clear that the decision in *De Paiba v. Ludlow* was made because the Court failed to distinguish between a waiver of proof at the trial, which the defendant was of course at liberty to make, and a waiver in the policy itself, by which it was converted into a mere wager.

"In consequence of this case and others which followed it, Parliament was forced to interfere, as it did, by the act of 19 George II. (chap. 37), reciting the mischiefs which had arisen from the making of marine insurances, 'interest or no interest,' and prohibiting them thereafter; and when the question subsequently arose in *Craufurd v. Hunter* (*supra*) as to the validity at common law of a mere wagering policy upon a ship, it was held to be valid solely upon the authority of the recitals in this act. It was in this indirect way that the doctrine in question, as to marine policies, first crept into the law. It was important to show this, because the effect of what I consider as the inadvertence of the Court in *De Paiba v. Ludlow* was not confined to policies upon ships. It must have been, I think, in consequence of the doctrine initiated by that case, that it came to be understood in England that in insurances upon lives it was not necessary at common law that the party to be benefited by the policy should have any interest in the life insured. There may not have been any direct decision to that effect; yet, that such was the prevalent impression is to be inferred from the enactment of the Statute of 14 George III. (chap. 48) (a), prohibiting insurances upon lives where the person insuring had no interest in the life."

To this effect: *Bersch v. Sinnissippi Ins. Co.*, 28 Indiana, 64; *Sawyer v. Mayhew*, 51 Maine, 398 (a case of marine insurance); *United B. M. A. Society v. McDonald*, 122 Penn. State, 324; 1 Lawyers' Rep. Annotated, 238; *Cammack v. Lewis*, 15 Wallace (U. S. Supr. Ct.), 643 (creditor insuring debtor's life for a grossly excessive amount); *Trinity College v. Travellers' Ins. Co.*, 113 North Carolina, 244; 22 Lawyers' Rep. Annotated, 291.

Some courts however have held that at common law no interest in the life is requisite to a policy. *Trenton M. Life & F. Ins. Co. v. Johnson*, 4 Zabriskie (New Jersey), 576; *Mowry v. Home L. Ins. Co.*, 9 Rhode Island, 346; *Chisholm v. Nat. C. L. Ins. Co.*, 52 Missouri, 213; 44 Am. Rep. 114. In the Rhode Island case the Court say the reasons adduced to the contrary in New York "do not seem very forcible," and approve the statement in the

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New Jersey case that “a policy on another life is just as dangerous and tempting to crime where there is an interest as where there is not.”

Duer says (1 Insurance, p. 95): “The practice indeed of wager policies has ceased throughout the United States, and their entire illegality may now be fairly considered as universally established or admitted.”

No. 11. — POWLES v. INNES.

(EX. 1843).

**No. 12. — NORTH OF ENGLAND OIL CAKE CO. v.
ARCHANGEL MARITIME INSURANCE CO.**

(Q. B. 1875.)

No. 13. — INGLIS v. STOCK.

(APPEAL FROM STOCK v. INGLIS.)

(H. L. 1885.)

RULE.

IF there is a sale whereby the risk of goods is transferred, the purchaser thereupon has, and the vendor ceases to have, an insurable interest in the goods. If the vendor has insured the goods, it is a question of intention of the contracting parties whether the benefit of the policy is to be transferred. If that is the intention, the vendor, who is expressed to be insured under the policy, becomes a trustee for the purchaser and can recover on the policy in that character. But where no such intention can be inferred, the contract of insurance is determined by the transfer of the risk.

Powles and others v. Innes.

11 M. & W. 10-13 (s. c. 12 L. J. Ex. 163).

Insurance. — Sale. — Interest.

[10] A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy, except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit.

No. 11. — Powles v. Innes, 11 M. & W. 10, 11.

This was an action of assumpsit on a policy of insurance on ship. The declaration stated that the policy was made by the plaintiffs as agents for Robert Page and Robert Chamberlain; that Page and Chamberlain, and one Sarah Banks, were, during the risk and until and at the time of the loss, interested in the ship to the amount of the money insured; and that the ship was totally lost. The defendant pleaded, first, payment of £75; secondly, as to the residue, *non assumpsit*; thirdly, except as to £75, that although Chamberlain was interested in the ship during the risk and at the time of the loss to the amount of £400, in respect of which the plaintiffs were entitled to recover the said sum of £75, yet that, save as aforesaid, Chamberlain and Page were not interested in the ship during the risk, and that the policy was not made by the plaintiffs as agents for Sarah Banks or for her benefit, nor did she give any order for effecting the same; and fourthly, except as to £75, that although Chamberlain was interested during the risk to the amount of £400, &c., yet, save as aforesaid, Chamberlain, Page, and Banks were not interested in the ship during the risk, *modo et formâ*. On these pleas issues were joined.

The cause was tried before Lord ABINGER, C. B., at the Middlesex Sittings after Trinity Term, 1840, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

On the 22nd of January, 1838, the plaintiffs, who are insurance agents, by directions from, and on account and for the benefit of, Robert Page and Robert Chamberlain, in respect of their two-thirds of the vessel, effected a policy of insurance on the ship *Commerce*. The premiums were charged to and paid by Page and Chamberlain. The policy was subscribed by the defendant for £150. At the time of *the insurance and at the [*11] time of the loss, the vessel was of the value of £1200. At the time of effecting the insurance, Chamberlain, Page, and Sarah Banks were each interested in one-third of the vessel. The vessel was lost in January, 1839, within the time mentioned in the policy. Before the loss, Page, by bill of sale, conveyed his share to Sarah Banks. From the time of the said bill of sale down to the time of the loss, Chamberlain and Sarah Banks were owners of the *Commerce*, the former of one-third and the latter of two-thirds of that ship. On the day after the sale, Sarah Banks

ordered a policy for £600 to be effected in respect of her two-thirds for twelve months, which was accordingly effected in the Alliance Office, and upon which she received as for a total loss.

The question for the opinion of the Court is, whether the verdict should be entered for the plaintiffs or for the defendant, and for what amount, if any, and upon which of the several issues joined between the parties. The pleadings are to form a part of the case, and the Court are to be at liberty to draw such conclusions as they shall think the jury ought to have drawn.

W. H. Watson, for the plaintiffs. — The question in this case is one which, although often considered, has never been expressly determined; namely, whether, where a person, being the owner of a vessel, after effecting a policy of insurance upon it, sells his interest in the vessel, by such transfer of his interest the policy is at an end. The plaintiffs contend that it is not, but that it continues in force, and the party who recovers upon it is a trustee for the purchaser. [Lord ABINGER, C. B. The form of declaration is, that the plaintiff was interested "during the risk and until and at the time of the loss." Unless the policy be expressly assigned to the purchaser, why should it pass any more than any other

wager on the vessel?] The policy is merely an accessory [*12] to the principal, the *ship. [PARKE, B. If the policy were

handed over at the time of executing the bill of sale, that would be evidence of the intention of the parties that the seller should be a trustee for the purchaser. The question really is, Is it an incident to the vessel?] In *Sparkes v. Marshall*, 2 Bing. N. C. 761, 3 Scott, 172, TINDAL, Ch. J., says: "If the plaintiff have an insurable interest at the time the policy was effected, whatever change may have taken place in the property since can have no effect in relieving the underwriters from their liabilities, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed." [PARKE, B. In that case the plaintiff was interested both at the time of the insurance and of the loss. Lord ABINGER, C. B. That judgment must be taken to mean that the assignment of the goods makes no difference, provided the parties keep the contract of insurance alive for the benefit of the assignee. PARKE, B. The contract of insurance is a contract of indemnity.] Yes, but it is a contract to indemnify anybody who may be interested in the subject-matter; it is an indemnity in respect, not of the underwriter, but of the subject-

No. 11. — *Powles v. Innes*, 11 M. & W. 12, 13.

matter of insurance; and though it is necessary to allege an interest in the declaration, it is not necessary to allege it to have existed down to the time of the loss. [Lord ABINGER, C. B. I never saw it otherwise.] In *Perchard v. Whitmore*, 2 Bos. & P. 155, n., which was an action on a policy of insurance on goods, the declaration averred that P. M. and N. M., until and at the time of the loss, were interested in the goods, and that the insurance was made for them and on their account. It appeared on the evidence upon the *voir dire* of a witness called for the plaintiffs, that since the policy was effected he had become a partner with P. M. and N. M., and had taken a share of the goods insured: and upon objection that this evidence disproved the allegation of interest in the declaration, * BULLER, J., ruled that [* 13] the plaintiff ought not to be nonsuited, for that the witness was not interested at the time of making the policy, "to which the averment of interest related, and the plaintiff brought the action for those who were interested at the time."

Greenwood, *contra*, was stopped by the Court.

LORD ABINGER, C. B. I am clearly of opinion that the defendant is entitled to our judgment. The last authority that has been cited is a mere note of a *Nisi Prius* case, the correctness of which I greatly doubt. The contract of insurance was originally only a contract of wager, that the vessel should arrive at her destination: since the legislature has adopted it, it is a contract of indemnity only, and nobody can recover in respect of the loss who is not really interested. The policy is but a chose in action, and cannot pass merely by the assignment of the ship.

PARKE, B. I am of the same opinion. The plaintiff can only recover an indemnity. Then what has this party lost, if he has sold his interest in the ship, irrespective of the policy? Banks's interest is not protected, because she gave no authority to effect the insurance. Unless, therefore, there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser: but we cannot infer that, no facts being stated in the case to warrant such an inference.

GURNEY, B., concurred.

Judgment for the defendant.

No. 12. — *N. of Eng. Oil Cake Co. v. Archangel Mar. Ins. Co.*, L. R. 10 Q. B. 249.

North of England Oil Cake Co v. Archangel Maritime Insurance Co.

L. R. 10 Q. B. 249-255 (s. c. 44 L. J. Q. B. 121; 32 L. T. 561; 24 W. R. 162).

Insurance. — Termination of Interest. — Assignment of Policy. — 31 & 32 Vict., c. 86, s. 1.

[249] On the 24th of November, 1871, V. Brothers insured with defendants in London a cargo of linseed, belonging to them, then on board a brig at Constantinople, for a voyage thence to a port of call and discharge in the U. K. to be named, including all risks of craft or lighters to and from the brig, each lighter to be considered as if separately insured, the policy expressing the agreement to be with V. Brothers and their assigns. The linseed was shipped under a bill of lading, whereby it was to be delivered at a safe port in U. K. to V. Brothers or assigns. Whilst the brig was on the voyage the agents of V. Brothers, on the 17th of February, 1872, sold in London to plaintiffs the cargo of linseed; by the sold-note the seed was to be delivered at destined port in sound merchantable condition, and paid for in fourteen days from being ready for delivery by cash less $2\frac{1}{2}$ per cent discount, or at seller's option on handing shipping documents, less interest at 5 per cent. The vessel to go to any safe floating port in U. K. The bill of lading was indorsed to plaintiffs. On the 21st of February, plaintiffs named a safe floating port, and on the arrival of the brig at the port the cargo was landed by public lighters employed by plaintiffs; on the 28th of February, one of the lighters was sunk off the plaintiffs' wharf, being a loss within the terms of the defendants' policy. The loss occurred when part only of the cargo had been discharged, and before plaintiffs had paid the price of the cargo. In June, 1872, the policy was handed by V. Brothers to plaintiffs; and on the 17th of October V. Brothers indorsed on it an assignment to plaintiffs, and they brought an action upon it to recover for the loss of the seed in the lighter:—

Held, that the plaintiffs could not recover. The policy was not expressly agreed to be assigned to plaintiffs by the sold-note; and no such intention could be inferred from the terms of the note, inasmuch as it was necessary that V. Brothers should keep the policy for their own protection until right delivery of the cargo. When the seed was put on board the lighter employed by plaintiffs, the seed was delivered to plaintiffs, and V. Brothers' interest ceased and the policy lapsed; and the subsequent assignment by V. Brothers to plaintiffs was therefore of no avail under 31 & 32 Vict., c. 86, s. 1.

Case stated by consent after issue joined.

1. 2. The action is brought to recover £77 4s., with interest, on a policy of insurance.

3. The plaintiffs carry on the business of seed crushers at Stockton-on-Tees, one of the ports of the United Kingdom, and have a landing wharf there; and the defendants carry on, at Athens in

No. 12. — N. of Eng. Oil Cake Co. v. Archangel Mar. Ins. Co., L. R. 10 Q. B. 249, 250.

the kingdom of Greece, the business of marine insurance on ships * and cargoes, and have also offices and a local [* 250] board of direction in London for conducting and carrying on such business.

4. On the 24th of November, 1871, Vagliano Brothers insured with the defendants a cargo of 2950 chetwerts of linseed, belonging to them, of the value of £6200, for the sum of £1500 at a premium of £52 10s., which Vagliano Brothers then paid to the defendants, the linseed then being on board the brig *Fanny*, at Constantinople, for a voyage from Constantinople to a port of call and discharge in the United Kingdom to be named, including all risks of craft or lighters to and from the said brig, each lighter and craft being considered as if separately insured, the policy of insurance being expressed to be with Vagliano Brothers and their assigns.

5. The linseed had been duly shipped by Vagliano Brothers on board the brig, which then commenced the voyage in conformity with the terms of the policy, under a bill of lading dated the 29th (10th) of November, 1871, whereby the linseed was to be delivered at a safe port in the United Kingdom, unto Vagliano Brothers or their assigns.

6. Whilst the brig was still on her voyage, Edwards & Co., who then acted as the agents of Vagliano Brothers in England, on the 17th of February, 1872, sold to the plaintiffs the cargo of linseed.

The following are the material parts of the sold-note:—

“LONDON, 17th February, 1872.

“Sold this day to the North of England Pure Oil Cake Company Limited, the following Taganrog linseed, viz. the cargo per *Fanny*, consisting of about 2448 quarters, and now at Scilly, at 62/3 (sixty-two shillings and three pence) per 424 lbs. The seed is to be delivered at destined port in sound merchantable condition, and to be worked in thirteen days, and paid for in fourteen days from being ready for delivery by cash, less 2½ per cent. discount, or at seller's option, on handing shipping documents, less interest at 5 per centum per annum. . . . The vessel to go to any safe floating port in the United Kingdom. Should the whole or any portion of the above-named seed be sea or otherwise damaged, the same is to be taken with an allowance, which, together with any dispute arising out of this contract, shall be settled by arbi-

tration in London; and should any portion of it be found [*251] damaged equal * to 15 per cent. on the above price, such seed shall be taken as part of the contract at the fair valuation of the day, to be fixed by the arbitrators. . . . ”

7. The plaintiffs ultimately paid Vagliano Brothers, through Edwards & Co., the price of the linseed in cash, less $2\frac{1}{2}$ per cent. discount, in conformity with the sold-note.¹ On the 21st of February, 1872, Vagliano Brothers indorsed the bill of lading to the order of Messrs. Edwards & Co., who indorsed the same to the plaintiffs. The sellers of the cargo did not exercise their option mentioned in the contract note.

8. The plaintiffs duly notified Stockton-on-Tees (being a safe-floating port within the terms of the policy) as the destined port of discharge of the cargo; and on the 26th of February, 1872, the brig duly arrived at the port with her cargo, then intact.

9. The cargo was landed by means of public lighters, employed by the plaintiffs to unload the cargo from the brig, and to land the same at the plaintiffs' wharf. The employment of the lighters was within the terms of the policy, and was necessary for unloading and right delivery ashore of the cargo.

10. On the 28th of February, 1872, one of the lighters, filled with part of the cargo, arrived safely alongside of the plaintiffs' wharf, and was there sunk by perils within the terms of the policy, and thereby the same was partly lost and partly damaged.

11. The above-named loss occurred when a part only of the cargo had been discharged, and before the plaintiffs had paid the price of the cargo.

12. On the 4th of March, 1872, Vagliano Brothers made a claim, on the defendants, for the loss of the linseed in the lighter, and on the 5th of March, 1872, claimed and received from them a sum of money as return of premium, on the ground that the brig had arrived at Stockton-on-Tees. They retained the same, and no demand for the same has ever been made by the plaintiffs. This return of premium is indorsed on the policy; such return of premium does not, by the usage at Lloyd's, preclude the assured from afterwards claiming a loss upon the policy, if any loss has in fact occurred.

[*252] * 13. On the 11th of May, 1872, a claim for £77 4s., in

¹ The date of the payment nowhere appeared in the case.

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respect of the loss, was made by Vagliano Brothers, and was indorsed on the policy.

14. The policy was in June, 1872, handed over to the plaintiffs by Vagliano Brothers, and on the 17th of October, 1872, Vagliano Brothers indorsed on the policy an assignment of it by them to the plaintiffs.

15. The Court is to have power to draw inferences.

The question for the opinion of the Court is, whether upon the above facts the plaintiffs are entitled to recover, from the defendants, the said loss.

Butt, Q. C. (with him Bohn), for the plaintiffs. By 31 & 32 Vict., c. 86, s. 1, a policy of insurance can now be assigned so as to enable the assignee to sue in his own name, and this assignment may be made after the loss: *Lloyd v. Fleming*, L. R. 7 Q. B. 299, 41 L. J. Q. B. 93. The property in the cargo passed to the plaintiffs on the execution of the sold-note, and this, it is to be observed, was a contract made in London for the sale of a cargo at sea. In 1 Arnould on Marine Ins. p. 106, 4th ed., it is said: "When a floating cargo (i. e. a cargo at sea) is sold in London, it is generally on what are called the 'London floating conditions,' which comprise the delivery over to the purchaser for his benefit of the policies which have been effected on the cargo, the understanding being that it is insured to the full value, the price paid being all the higher, to include the amount paid by the vendor for insurance.

. . . Where a cargo of wheat, still afloat, was sold at a depreciated price, and the vendor indorsed over the policy for so much only as would cover the depreciated price, being part merely of the sum insured in a valued policy, it was held as a matter of construction on the bought-note, taken in connection with the existence of the policy at the time of the contract, that the buyer was entitled to the policy for the full sum at which the wheat was originally insured under it," citing *Ralli v. Universal Marine Insurance Co.*, 2 J. & H. 159, 4 De G. F. & J. 1, 31 L. J. Ch. 207, 313. *Primâ facie* it would be an unreasonable construction of the contract of sale of a cargo exposed to sea risks and covered by a policy of *insurance, that the vendor intended to absolve [*253] the underwriters and allow the policy to drop. Payment in exchange for "shipping documents" always includes any policy existing, and in some cases it may be a question whether a vendor is not bound to tender a policy sufficient to cover all the cargo,

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though such does not exist: *Tanvaco v. Lucas*, 1 B. & S. 185, 30 L. J. Q. B. 234 in error, 3 B. & S. 89, 31 L. J. Q. B. 296.

[QUAIN, J., referred to *Powles v. Innes*, 11 M. & W. 10 (p. 356, *ante*).]

When the interest is assigned the policy drops, but it will not drop so long as any interest remains in the vendor.

[LUSH, J. — The plaintiffs took delivery by sending their lighters, so that as soon as the linseed was on board the lighter the vendors' interest had ceased.]

Only in that particular part; and the vendors had an interest up to the date of handing over the policy by reason of their unsettled account for the cargo. There is no case that part of a policy can be assigned. [He also referred to *Hurry v. Royal Exchange Assurance Co.*, 2 Bos. & P. 430 (5 R. R. 639); *Ebsworth v. Alliance Insurance Co.*, L. R. 8 C. P. 596 (p. 215, *ante*); *Anderson v. Morice*, L. R. 10 C. P. 58.]

W. Williams, Q. C. (with him Crompton), for the defendants. There is nothing in the contract of sale to imply that the policy was to be assigned for the plaintiffs' benefit; and if so, on the delivery of the goods, Vagliano Brothers' interest was at an end, and the policy dropped. This is not the case of a sale as on London floating conditions; the insurance in those cases is taken into consideration in the price. Here the sellers' interest under the policy continued till the delivery, for they were only to be paid on delivery of the cargo; consequently it is clear that the policy was not intended to be assigned for the plaintiffs' benefit.

Butt, Q. C., in reply.

COCKBURN, Ch. J. — We are agreed on one point, which entitles the defendants to judgment, viz. that, the policy not having been assigned until after the interest of the assignors had ceased, an effective assignment was impossible. If there had been a [* 254] * stipulation in the contract of sale that the policy should be assigned for the benefit of the plaintiffs, the vendees, it might have been otherwise; but not only is there no express stipulation to that effect, but the implication from the nature of the contract is the other way. This is not like the common case of the sale of a floating cargo, where the seller parts with and the buyer takes at once the property, and all risks. In such a case, the policy, according to the established practice, passes as part of the shipping documents, and on assignment the vendee can sue upon it in case of loss. And there is no hardship in this on the

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insurers, because they insured the safety of the cargo to the end of the voyage, and it is immaterial to them in whom the interest vests at the time of the loss; and there is great convenience in the practice, as it obviates the necessity of the vendee getting a fresh policy and facilitates the sale of cargoes at sea. But this is not an out-and-out sale; on the contrary, although the sale might at once transfer the property to the vendees, yet an essential term of the agreement was that payment was only to take place on the right delivery of the cargo, so that the interest, a substantial real interest, remained in the sellers. If the cargo had perished at sea, the sellers would not have got one shilling; therefore until delivery to the plaintiffs, the buyers, the interest in the policy remained in the sellers. But on the delivery to the plaintiffs the sellers became entitled to payment and their interest in the policy ceased; and the policy was at an end. Consequently, although an actual assignment may be good after the loss, in the present case the assignment was not in consequence of a previous agreement before the policy dropped, and therefore the sellers had no interest in the policy, and nothing to assign.

LUSH, J. — I am of the same opinion. It is clear the contract of sale did not confer any interest in the policy on the plaintiffs; and the mention of shipping documents in such a contract would not of itself without more include the policy. If, then, the policy were not agreed to be assigned before the sellers' interest ceased by the delivery on board the lighters, an assignment after that interest had ceased could not create an interest in the plaintiffs.

The *right to sue in the original owners' name was by [*255] virtue of the interest which had been agreed to be passed from the one to the other; and the right given by the statute to sue in the assignees' own name only applies in cases where he could have sued in the vendor's name.

QUAIN, J. — I am of the same opinion. *Powles v. Innes*, 11 M. & W. 10 (p. 356, *ante*), is directly in point for the defendants. On the sale of a thing insured no interest in the policy passes to the vendee unless at the time of the sale the policy be assigned either expressly or impliedly. The only question, therefore, which it is necessary to decide in the present case is, whether there is any stipulation, express or implied, in the sale-note from Vagliano Brothers to the plaintiffs. Express stipulation is out of the question; and none can be implied from the nature of the contract.

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On the contrary, it was a mere accident that the plaintiffs took delivery by lighters from the ship's side; this was clearly not anticipated at the time of the contract. The mention of the delivery of "shipping documents" can have no application to the policy in such a case. There was, therefore, no policy contemplated that should be kept alive for the benefit of the vendees, while the interest in the vendors remained; and the law is clear that a subsequent assignment cannot operate to give the assignee an interest in the policy.

Judgment for the defendants.

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10 App. Cas. 263-275 (s. c. 54 L. J. Q. B. 582; 52 L. T. 821; 33 W. R. 877).

[263] *Insurance. — Insurable Interest in Goods at Purchaser's Risk. — Sale of Goods "f.o.b."*

D. sold to B. 200 tons of German sugar "f.o.b. Hamburg; payment by cash in London in exchange for bill of lading;" the price to be variable according to the percentage of saccharine matter, which was not to exceed or fall short of certain limits. B. resold to the respondent the same quantity at an increased price, but otherwise upon similar terms. D. also sold to the respondent 200 tons upon similar terms. To fulfil these contracts 390 tons (being ten tons short) were shipped in bags on one vessel at Hamburg for Bristol, no bags being set apart for one contract more than the other. Each bag was marked with its percentage of saccharine matter, and bills of lading with marks corresponding to the bags were sent to D. to be retained till payment in accordance with the contracts. The respondent was insured in floating policies upon "any kind of goods and merchandises" between Hamburg and Bristol, and duly declared in respect of this cargo. The ship sailed from Hamburg for Bristol and was lost. After receiving news of the loss D. allocated 2000 bags or 200 tons to B.'s contract, and 1900 bags or 190 tons to the other contract. In an action upon the policies:—

Held, affirming the decision of the Court of Appeal, that the sales being "f.o.b. Hamburg" the sugar was at the respondent's risk after shipment; that he had an insurable interest in it; and that the underwriters were liable.

Appeal from an order of the Court of Appeal (BRETT, M. R., BAGGALLAY, and LINDLEY, L.JJ.), 12 Q. B. D. 564, reversing a decision of FIELD, J. (9 Q. B. D. 708). The facts are stated in the reports of the decisions below, and in the judgment of the LORD CHANCELLOR in this House.

Mar. 26, 27. Sir F. Herschell, S. G., and A. Cohen, Q. C. (J. Gorell Barnes with them), for the appellant:—

The respondent may have had an insurable interest in loss of

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profits on the two contracts, but he had none in the goods * themselves. The decision of the Court of Appeal was [* 264] based upon a supposed custom or course of business as to the allocation or distribution of the bags for each contract, and upon the respondent's supposed knowledge thereof. But the evidence fails to support such a state of things. The sugar might have been appropriated at the time of shipment. As it was not, no property had passed to the respondent at the time of the loss, and the sugar was then at the risk, not of the respondent, but of the vendors. The property was still in the vendors, subject, perhaps, to a special property in the German bankers who had advanced payment. Unless before the loss there is such an appropriation as to enable the purchaser to claim a particular part of the cargo as his, there is no insurable interest: *Anderson v. Morice*, L. R. 10 C. P. 609, 616; 1 App. Cas. 713; *Seagrave v. Union Marine Insurance Co.*, L. R. 1 C. P. 305, 320; *Ebsworth v. Alliance Marine Insurance Co.*, L. R. 8 C. P. 596 (p. 215, *ante*). No property can pass in goods till separation from bulk: *Blackburn on Sales*, p. 122; *Benjamin on Sales*, chap. 5. There was no appropriation here till after the loss; and no appropriation at all with the purchaser's consent. That being so, the purchaser was not bound to accept the appropriation or pay for the sugar. The vendor could appropriate as he pleased, provided he fulfilled the contract, and the price depended upon the mode of appropriation. No appropriation after the loss would suffice unless the purchaser had the right of selection, which was not the case here. There was no evidence of any express or implied authority to appropriate after the loss. The purchaser's interest (such as it was) being not an interest in specific goods was not insurable.

C. Russell, Q. C., R. T. Reid, Q. C., and Danckwerts, for the respondent, were not heard.

March 30. EARL OF SELBORNE, L. C. :—

My Lords, the question in this case is whether the plaintiff had, at the time of the loss of the steamer *City of Dublin* in the River Elbe, on the 4th of February, 1881, an insurable interest in 3900 bags (or 390 tons weight) of sugar, part of that vessel's * cargo? The Court of Appeal, reversing a judgment of [* 265] FIELD, J., decided in the plaintiff's favour.

By two contracts dated respectively the 7th and 12th of January,

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1881, which were (except as to dates and parties) identical in their terms, Messrs. Drake & Co., merchants of London, agreed to sell to one Beloe and to the plaintiff respectively, 200 tons each of German beet root sugar to be shipped from Hamburg. The material terms of the contract between Drake and Beloe are these: "London, 7th January, 1881, Messrs. W. Beloe & Co. We have this day sold to you for your account 200 tons German beet sugar of the crop 1880-81, at 21s. 9d. per cwt. of 50 $\frac{3}{4}$ kilos, net f.o.b. Hamburg for 88 degrees net saccharine contents." I need not read all the details. "The sugar shall analyse between 85/92 net both inclusive; sixpence per cwt. to be paid or allowed for each degree above or below 88, fractions in proportion; but anything above 92 not to be paid for. Should the average analysis of whole contract exceed 90, such excess is not to be paid for. The analysis is to be effected by a public German chemist." Then, omitting some immaterial points, it goes on: "For January delivery at Hamburg. Payment by cash in London in exchange for bill of lading less two months' interest at 5 per cent per annum. Any dispute arising out of this contract to be settled by arbitration of two London brokers in the usual way."

By another contract, dated the 7th of January, the plaintiff bought from Beloe the sugar which Beloe had contracted to buy from Drake & Co., upon substantially the same terms, except that the price to be paid for it to Beloe was to be 21s. 10 $\frac{1}{2}$ d. per cwt., subject to like variations between the same limits; and that the average analysis of the whole contract was "not to exceed 90." The price, therefore, in each case, was to be variable, according to the percentage of saccharine matter in the sugar; the goods were, in each case, to be delivered at Hamburg free on board, and (consequently) were, after shipment, to be at the purchaser's risk; and the bills of lading were to be retained by the vendors till the purchase-moneys were paid.

The plaintiff and Beloe at Bristol, and the agents of Drake & Co. at Hamburg, engaged space for these sugars in a general * ship, the *City of Dublin*, one of a line of steamers trading between Bristol and Hamburg. The shipping agents at Bristol, being informed by the plaintiff of his two purchases from Beloe and Drake & Co., and learning from Beloe that Drake & Co. were his vendors, advised their correspondents at Hamburg that 400 tons of sugar would be coming for that ship's

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cargo from Drake. I do not think it material, but it is proper to notice that the plaintiff did not know from whom Beloe had bought, and Drake & Co. did not know that Beloe had sold to the plaintiff, till after the loss.

The quantity actually put on board the *City of Dublin* at Hamburg was only 3900 bags, or 390 tons. As to this, I think it enough to say that if the plaintiff would have had an insurable interest in 4000 bags, under the circumstances of the case, he had, in my opinion, such an interest, though the quantity was short by ten tons.

No other sugar belonging to Drake & Co. was put on board this ship. The 3900 bags were, therefore, specifically separated from the bulk of the vendor's own sugar; and they were shipped under Drake & Co.'s contracts with Beloe and the plaintiff, with a view to and in fulfilment of the agreement of Drake & Co., as vendors, to put the purchased sugars "free on board." The present controversy arises out of the manner in which this was done. Each bag was distinguished by a mark denoting its percentage (according to certified analysis) of saccharine matter; and ten bills of lading, for parcels bearing marks corresponding with those on the bags, were made out in an impersonal form, and sent (according to the contracts) to Drake & Co., to be retained by them till the time of payment should arrive. The aggregate consignment (except as to the deficiency of 100 bags) was proper and suitable to fulfil the two contracts, without exceeding, as to either of them, the average of 90 per cent of saccharine matter; and (according to the evidence of Mr. Hales, a partner in the firm of Drake & Co.) it was made up and "ordered forward" as being "so divisible." But no particular bags were then set apart or marked as applicable to the one contract more than the other; it was thought sufficient by Drake & Co., or their agents, to leave this to be done when the bills of lading * came forward. There [* 267] would be no practical difficulty in doing it in a proper and reasonable way, even if the plaintiff had not purchased Beloe's contract, inasmuch as neither purchaser could claim, and Drake & Co. were not to be paid for, any excess beyond 90 per cent of the average analysis of the whole contract; though it was conceivably possible that it might have been done perversely and unreasonably. The division was in fact made by Drake & Co., who forwarded invoices of the parcels attributed to each purchaser

on the evening of the 4th of February, after they had received notice of the loss. In the division so made the deficiency of ten tons was ascribed to the plaintiff's contract, being the later in date. No question was raised by the plaintiff or by Beloe; and the purchase-moneys were paid by the plaintiff according to the contracts and invoices. But by this, which was done after the loss, the underwriters were (of course) not bound.

It is contended, on the part of the appellant, that, under these circumstances, and for want of a proper division before the loss, the shipment had not the effect of divesting the prior title of Drake & Co., the vendors, or of passing any interest in these sugars to the plaintiff. This argument appears to me to confound two very different things; the appropriation necessary as between vendor and purchaser, and the division, as between purchaser and purchaser, of specific goods, actually appropriated to the aggregate of the two contracts. I do not think it follows that there could be no appropriation by the vendor of which the purchasers might take the benefit, merely because the parcels of goods appropriated were mixed, in the act of appropriation, so as to require some subsequent division or apportionment. Whether this may have happened by previous agreement or course of dealing between all the parties (in which case there could be no serious doubt), or by accident, error, or want of proper care on the vendor's part, appears to me to make no difference in principle. The purchasers might possibly be entitled to reject, but the vendors could not, in my opinion, without their consent retract the appropriation.

In the present case, I see no reason to doubt that the difficulty arising from the confusion of parcels — material only to [*268] the settlement * of the amounts payable by the plaintiff to his two vendors — if not solved by consent (or by arbitration, for which each contract provided) would have been soluble by principles of law, applied to the facts and the terms of the contracts. The necessity for doing this, and the fact that it had not been done at the time of the loss, do not, in my opinion, sufficiently distinguish this case from *Browne v. Hare*, 3 H. & N. 484, 4 H. & N. 822, and earlier authorities to the same effect. The goods were, by the act of the vendors, separated from the bulk of all other goods belonging to them; they were shipped "free on board" in what (for that purpose) was the purchaser's ship, under two contracts so to deliver them; in both which con-

tracts (subject to the payments to be made by him to Drake & Co. and Beloe) the plaintiff was then (although Drake & Co. did not know it) solely interested. I cannot infer from any part of the evidence that, in so shipping them indiscriminately, the vendors intended to break, instead of fulfilling, their contracts, and to take upon themselves (contrary to those contracts) the subsequent risk of loss, and the liability to freight. Yet this (as it seems to me) would be the necessary consequence of the appellant's argument.

I think the order appealed from is right, and I move your Lordships to affirm it, and to dismiss the appeal with costs.

Lord BLACKBURN:—

My Lords, I also agree that there is no occasion to hear the counsel for the respondent.

The respondent (plaintiff below) had insured himself by floating policies to the extent of, as I understand, £5000. One of the policies is set out as a sample policy. It is a policy for £4000, part of £5000, and is marked on the margin No. 4247. By it the respondent caused himself to be insured in respect of goods conveyed in a steamer "from the continent of Europe between Havre and Hamburg, both ports included, ^{and} _{or} Rouen ^{and} _{or} Nantes to Bristol upon any kind of goods and merchandises," "beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above upon the said ship, &c., including all risks of craft, and so shall continue * and [* 269] endure during her abode there upon the said ship, &c.

And further, until the said ship with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety and upon the goods and merchandises until the same be there discharged and safely landed." Then I pass over a sentence which is immaterial for the present purpose. "The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at £4000, part of £5000, on sugar to be hereafter valued and declared. To follow policy for £4000 No. $\frac{3}{42246}$, dated 6th of December, 1880." The meaning of to be "hereafter valued and declared" is, that if the insured has several adventures, all within the description in the policy, out, he may select at his pleasure

which is to be protected by the policy; and, on his giving notice of such a selection to the insurers, the policy is as if it had named that adventure from the beginning. Of course, if adventures have been previously named, these come first, and whether those prior subjects of insurance are lost or not, the policy is equally *pro tanto functus officio*. And I believe the practice is, if there is nothing to show that the first adventure which came in safe was selected not to be under the policy, it is taken to be so, though there is no declaration.

The meaning of "To follow policy for £4000 No. $\frac{3}{4246}$ " is, that there being consecutive policies any loss declared is to be borne first by the earlier policies, and that it is not till after the policy No. $\frac{3}{4246}$ is exhausted, either by losses or declared adventures which have come in safe, that the underwriters on the policy which follows are to bear the balance of the loss if any. There is not, as far as I remember, any other difference between a policy in the present form with a declaration that it is on sugar valued at £3800, loaded in the *City of Dublin* steamer sailed from Hamburg to Bristol on the 3rd of February, 1881, and an ordinary policy for the same sugar valued at the same sum on the same steamer on the same voyage.

The defendant below is an underwriter for £150 on each of these consecutive floating policies.

[* 270] * There is no dispute, at least now, that the *City of Dublin* is such a steamer, and the voyage such a voyage as was within the terms of the policies, nor that the values and declarations were properly given, nor that there was enough left unexhausted on the policies to enable the underwriters to pay a total loss. But it was said that the situation of the plaintiff with regard to the sugars was not such as to give him an insurable interest. And I have no doubt that, in order to recover against an underwriter, the assured must show that he suffers loss in respect of the thing insured. In case of an insurance on goods, if he shows that he had at the time of the loss the whole legal property in the goods which were lost, he undoubtedly does show it. But I do not agree that this is the only way in which he can show an insurable interest in goods, or that any relation to goods such that if the goods perish on the voyage the person will lose the whole, and if they arrive safe will have all or part of the goods, will not give an interest which may be aptly described as goods.

No. 13. — *Inglis v. Stock*, 10 App. Cas. 270, 271.

In the present case there has been a good deal of extraneous matter brought into the discussion. I think if it had been remembered that the three contracts, *viz.*, that of the 7th of January, between Drake and Beloe, that of the same date between Beloe and the plaintiff, and the contract of the 12th of January, between Drake and the plaintiff, were all in writing; and it had been seen that they are so expressed that, as in my opinion, there is no doubt as to their construction, the objection would have been much more clearly raised, not, I think, for its benefit.

Drake & Co., of London, who were large importers of beet sugar manufactured in Germany, made a contract with Beloe of Bristol, who sometimes, as we find, bought to sell again. There are, I gather from a letter of the 25th of January, from Hermann of Hamburg to Drake, trading lines of steamers running twice a month from Hamburg to Liverpool, Leith, and Bristol, and it may be other places; but to London, and it may be other places, if a steamer is wanted from Hamburg it must be chartered, but, of course, it may be chartered.

And now, by the contract, Drake & Co. bound themselves to Beloe to supply 200 tons of German beet sugar of the crop of 1880–81. It was not only to be German beet sugar, but it was to *analyze between 85 and 92, “but anything [*271] above 92 not to be paid for”; so that it would seem that sugar below 85 would not fulfil the description in the contract, but sugar above 92 might be given in fulfilment of the contract, though the excess was not to be paid for. No portion of the sugar now in dispute was either below 85 or above 92 so that this term does not come into operation. The sugar was to be “net free on board Hamburg” and it was for January delivery at Hamburg. The price was to depend on the “average analysis of the whole contract.” “Should the average analysis of the whole contract exceed 90, such excess is not to be paid for.” The Solicitor-General raised an argument on this clause which I shall notice by and by. The price was to be paid in London in exchange for bill of lading.

Now under this contract the first thing to be done was by Beloe (the buyer). He must let Drake, the seller, or rather supplier, know in due time on what ship the goods were to be shipped free on board, for, till he knew that, Drake could not put the goods on board. Beloe might (as in fact he did), engage to put sugar on

No. 13. — *Inglis v. Stock*, 10 App. Cas. 271, 272.

board several steamers bound to Bristol, but he might have made an engagement to ship sugar for Leith and wish to have the sugar put on board the Leith steamer. Or he might (though that was less likely) have chartered a steamer for London, or any other port, and wish the sugar to be put on board that. As soon as he had secured room in the steamer he did select, and let Drake & Co. know in good time on what steamer they were to ship them, Drake & Co.'s part of the contract begins; they are bound to have there at Hamburg, and to ship free on board that ship, 200 tons of sugar answering in all respects the description in the contract. Provided the sugar of the proper quantity and description was put on board that ship it was no concern of Beloe's where or how Drake & Co. got it. So soon as they had done that they had fulfilled their part of the contract so far. But the price was to be paid in London in exchange for bill of lading. And no doubt from that it is to be implied that Drake & Co. were to take a bill or bills of lading for the sugar they put on board, and were in due time to be ready and willing to give the bills of lading in London in exchange for the price. If Drake & Co. did this, Beloe was bound to pay the price.

[* 272] * Now Beloe had on the same day, but whether before or after he had made the contract with Drake & Co. does not appear, made a contract with the plaintiff to supply him with 200 tons of sugar at $1\frac{1}{2}d.$ a cwt. higher price than that at which Drake had agreed to supply Beloe. As the plaintiff knew where he wanted the sugar, this was to be shipped "free on board A 1 steamer to Bristol." The description of the sugar was the same as that in the contract between Drake and Beloe except that it was said "average analysis not to exceed 90." The Solicitor-General said that if the average analysis exceeded 90, Beloe was bound to take it from Drake, but not to pay the excess in price; but the plaintiff was not bound to take this more valuable lot at all; but would be in his right if he rejected it. What would have been the case if that point was raised by the facts, we need not inquire, though I have a strong suspicion that a jury would not much favour it.

But on looking at the documents it appears that not only were the averages under 90, but that by no possible shuffling of the 3900 bags actually put on board the *City of Dublin* could 2000 bags have been selected, the average of which would exceed 90.

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The plaintiff did not know, and had no reason to inquire, where Beloe was to get the sugar with which he was to supply him. The plaintiff saw Edward Stock (his nephew as it happens, but that is immaterial), the agent for the Bristol line of steamers, and, according to the evidence of both the Stocks, the plaintiff's directions were to secure room for the 200 tons in the steamer, which would leave at the end of the month; and on the 11th of January, Edward Stock & Son, the Bristol agents for the steamers, wrote to Nisistle & Günther the following letter: "There are 200 tons of sugar sold for shipment the second half of this month, but we have not yet ascertained the names of the shippers. There are also further parcels in treaty," and so forth. This, it must be noticed, was before the contract between Drake and the plaintiff on the 12th of January, and how there can be any doubt raised that the plaintiff did his best as far as regards securing room on that steamer to take on board the sugar which Beloe was to ship or cause to be shipped, I am unable to conceive. He had to advise Beloe of this, and it is sworn that he did so, and I see no possible reason for doubting that he did.

* The position of things, then, as between Beloe and the [* 273] plaintiff, was this, — The plaintiff had done his part, and unless Beloe, by himself or Drake, or any one else, put the proper quantity of sugar of the proper description on board the steamer the plaintiff had a cause of action against Beloe. If Beloe did put the proper quantity on board he was entitled to recover the price in exchange for bills of lading, and it was no answer that the goods had perished at sea before the bill of lading was offered. He did send an invoice specifying the marks and numbers of 2000 bags, undoubtedly put on board, which Beloe alleged had been shipped on plaintiff's account.

If these were proper bills of lading for the sugar shipped, it is difficult to imagine a clearer case of a loss of sugar. It is said the bills of lading which he offered to give in exchange for the cash were not the bills of lading of goods shipped for him on the *City of Dublin*, and therefore he was not bound to pay in exchange for such bills of lading; instead of being liable to pay Beloe the price, he had an action against him for breach of contract in not shipping as he ought to have done. This requires us to notice some more of the evidence.

When on the 12th of January the plaintiff had made his con-

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tract with Drake he at once proceeded to Edward Stock & Sons, who on that very day advised Nisistle & Co. that the 200 tons were coming, so that plaintiff had done his part in securing room for that 200 tons, and if Drake & Co. have not shipped them, he has a cause of action against them. They did not ship the whole 200 tons, but only 190 tons — ten tons or 100 bags meant to be shipped having been delayed — for that Drake & Co. sent an invoice and received payment. And, as I said about Beloe, if Drake & Co. have offered the plaintiff bills of lading for goods which were not shipped for him he has a cause of action against Drake & Co., and was not bound to pay. But if Drake & Co. have fulfilled their contract and the bills of lading are those referring to the 1900 bags, then the subsequent loss by perils of the sea is no answer. The plaintiff must pay the price, and has lost it, and that is as clear a loss as can well be.

When Drake & Co., or rather their agents at Hamburg, were shipping the sugar and held the mate's notes, it was no [*274] doubt * their business to see that a proper bill of lading for each separate shipment was signed; and if at any time before the bills of lading left Hamburg they had been allocated to each shipment, no objection, not even an idle one, could have been raised. But instead of doing so the whole of the bills were sent in a lump to London that they might be allocated there. This was perfectly *bonâ fide*. Drake & Co. had no interest in favouring one more than the other, and were to be paid exactly the same price per bag, whether they allocated it to the one or to the other. And if they had done this before the loss, I do not see what damage either Beloe or Stock could have sustained by the allocation being made in London instead of in Hamburg.

Now I have been quite unable to see, even if the plaintiff had sustained some damage, that it could have been damage going to the whole root of the matter, so as to form a defence for the plaintiff against an action by either Drake & Co. or Beloe for not paying for the goods in exchange for the bills of lading; that is, supposing the plaintiff (because prices had greatly fallen, or from any other unworthy motive) had wished to get off.

And if it were so, I think the case would fall entirely within what Lord HATHERLEY, in *Anderson v. Morice*, 1 App. Cas. 735, says is the principle of *Sparkes v. Marshall*, 2 Bing. N. C. 761. The insurers have no right to call upon the insured to exercise a

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possible option to be released from their contract. But, the loss having happened before the actual allocation, the plaintiffs' loss, when it happened, was a loss not of 200 tons, but of 200 tons parcel of 390 tons, so that the loss, though exactly the same, is said not to be the same in description, because it is the loss of an undivided portion of the goods, instead of being the loss of the goods themselves. I am quite unable myself to perceive why that should make the slightest difference. In the merits, certainly it does not. I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest in goods just as much as if it were an interest in every portion of the goods. No authority was cited in order to show that it was not so, and I can see no reason for it. Then, that being so, of course it follows that there is no defence at all, and this is my opinion.

* This, however, is not the ground on which the Court [* 275] of Appeal decided. They thought that there was shown to be a custom or course of dealing which rendered *Drake & Co.*'s conduct a literal fulfilment of the contract. I am not satisfied that on the evidence such a custom or course of trade is shown. I do not say it is not, but I would at least wish to hear the respondent's counsel before deciding on that ground. On the other, as I have already intimated, I have no doubt at all.

Lord WATSON:—

My Lords, I concur in the judgments delivered, and have nothing to add.

Lord FITZGERALD:—

My Lords, I also concur.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 30th March, 1885.

ENGLISH NOTES.

In connection with *Inglis v. Stock*, may be again referred to *Anderson v. Morice*, and *Colonial Insurance Co. v. Adelaide Marine Insurance Co.*, fully cited in the notes to *Lucena v. Craufurd*, No. 1, p. 151, *ante*.

Other cases in which insurable interest has been held to pass with the property are *Hibbert v. Carter* (1787), 1 T. R. 745, 1 R. R. 388; *Sparkes v. Marshall* (1836), 2 Bing. N. C. 761. The observations of

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TINDAL, Ch. J., in the last mentioned case (2 Bing. N. C. 774), may be here noted: — “If the plaintiff had an insurable interest at the time the policy was effected, whatever change may have taken place in the property in the oats since can have no effect in relieving the underwriters from their liability, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed.”

By the Policies of Marine Insurance Act 1868 (31 & 32 Vict. c. 86), where a policy of insurance on ship, goods or freight, has been assigned so as to pass the beneficial interest in the policy to any person entitled to the property insured, the assignee may sue upon the policy in his own name. It has been decided that this enactment is not confined to cases where the policy is assigned along with the goods before the loss, but also applies to a policy upon goods assigned after loss; and that the assignee of such a policy so assigned may sue upon it in his own name: *Lloyd v. Spence* (1872), L. R. 7 Q. B. 299, 41 L. J. Q. B. 93, 20 W. R. 296.

The following passages in the judgment of the Court delivered by BLACKBURN, J., in this case are instructive (41 L. J. Q. B. 94): — “A policy of marine insurance is a contract of indemnity against all losses accruing to the subject matter of the policy from certain perils during the adventure. This subject matter need not be strictly a property in either the ship, goods, or freight, for, as has been long said, if a man is so situated with respect to them that he will receive benefit from their arriving safely at the end of the adventure, or sustain loss in consequence of their not arriving safely, he has an insurable interest, — see per Lawrence, J., in *Lucena v. Crauford*, 3 Bos. & P. 75; 2 Bos. & P. (N. R.) 269 (p. 151, *ante*). If the assured, before the termination of the adventure, has parted with all interest in the subject matter of the insurance, he can suffer no damage from any subsequent loss, and consequently, from the nature of the contract being one of indemnity, he cannot recover in respect of any loss subsequent to his transfer of the property, — see *Powles v. Innes*, 11 M. & W. 10, 12 L. J. (N. S.) Ex. 163 (p. 356, *ante*). And, for exactly the same reason, an attempted transfer of the beneficial interest in the policy, before loss, to a person having no beneficial interest in the subject matter is inoperative; for the *cestui que trust* of the contract, having nothing in respect of which to be indemnified, could recover no indemnity. But after the loss has happened, and the adventure is over, this reason ceases at once. The assured may sell the damaged subject of insurance, thereby, as it were, ascertaining how much his loss is, and yet recover for the loss he has sustained. . . . — In the case of an assignment after the loss, when the policy and “all the rights under and by virtue of it are assigned,” it seems to us that

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the assignee becomes entitled to the property thereby insured, for then it is ascertained that the interest in the damage, the *chose in action*, is the only property which is covered by the policy; consequently that the words of the Act are literally complied with."

In connection with this subject, may be noted the construction of a term very usual in contracts for purchase of insured goods, which has been laid down by the high authority of BLACKBURN, J. (afterwards Lord BLACKBURN), as one of the consulted Judges in *Ireland v. Livingstone* (1872), L. R. 5 H. L. 405, 41 L. J. Q. B. 201, 204. He says: — "The terms *at a price*, 'to cover cost, freight and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignor with the agreed price, and giving him credit for the amount of the freight which he will have to pay to the ship-owner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board, he will have to pay the freight, which will make up the amount which he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner. In substance, therefore, the consignee pays, though in a different manner, the same price as if the goods had been bought and shipped to him in the ordinary way. . . . — If freight is high the consignor being the vendor, gets the less for the goods he supplies; if freight is low he gets the more. But inasmuch as he has contracted to supply the goods at this price he is bound to do so, though owing to the rise in prices at the port of shipment making him pay more for the goods, or of freight causing him to receive less himself, because the shipowner receives more, his bargain may turn out a bad one. On the other hand, if, owing to the fall in prices in the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party binds himself absolutely to supply the goods in a vessel such as is stipulated for, at a fixed price, to be paid for in the customary manner, that is, part by acceptance on receipt of the customary documents, and part by paying the freight on delivery, and the other party binds himself to pay that fixed price. Each party there takes upon himself the risk of the rise or fall in price, and there is no contract of agency or trust between them, and therefore no commission is charged."

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Such a contract has been held (upon verdict maintained by the Court) to be satisfied, so far as relates to the policy to be handed over as one of the shipping documents, by the ordinary policy made on shipment to secure the invoice price; and it is not necessary, as a matter of law to deliver a policy covering the price according to the sale contract. *Tanvaco v. Lucas* (1861, 1862), 1 B. & S. 185, 3 B. & S. 89; 30 L. J. Q. B. 234, 31 L. J. Q. B. 296.

AMERICAN NOTES.

These cases are cited in *Biddle on Insurance*, respectively at sections 263, 160, 202, where the doctrine is stated that insurance in respect of property is not insurance of the specific thing mentioned in the policy, but an agreement indemnifying the insured against loss or damage to his interest therein, and so does not pass as an incident to a sale or transfer, and if the insured parts with his interest in the thing mentioned he cannot recover on a loss. Substantiated more or less by *Garland v. Ins. Co. of N. A.*, 9 Illinois Appeals, 571; *McCluskey v. Prov. Wash. Ins. Co.*, 126 Massachusetts, 306; *Morrison's Adm'r v. Tenn. M. & F. Ins. Co.*, 18 Missouri, 262; 59 Am. Dec. 299; *Bergson v. Builders' Ins. Co.*, 38 California, 541; *Simeral v. Dubuque M. F. Ins. Co.*, 18 Iowa, 319; *Ætna F. Ins. Co. v. Tyler*, 16 Wendell (New York), 385; 30 Am. Dec. 90; *Lett v. Guardian F. Ins. Co.*, 125 New York, 82; *Quarles v. Clayton*, 87 Tennessee, 308; *Sabotta v. St. Paul F. & M. Ins. Co.*, 54 Wisconsin, 687; *Carpenter v. Prov. Wash. Ins. Co.*, 16 Peters (U. S. Supr. Ct.), 495; *Mt. Vernon M. Co. v. Summit Co. M. F. Ins. Co.*, 10 Ohio State, 347; *Hoxie v. Providence M. F. Ins. Co.*, 6 Rhode Island, 517; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minnesota, 85; *De Bollé v. Penn. Ins. Co.*, 4 Wharton (Penn.), 68.

Parsons says (1 *Marine Ins.*, p. 56): "The mere assignment, however, or sale of the property insured, gives no right to the assignee or purchaser to sue the insurer for a subsequent loss of the property, but it will suffice to destroy the claim of the original insured, and thus wholly discharge the insurer. It is quite certain, both in England and the United States, that a common policy of insurance does not go to the assignee of the property insured, as an incident of the property, or in any way attached to it. Emerigon states the law to be otherwise in France. We consider it equally certain now that the original assured loses all interest in the policy, by such an assignment or transfer of the subject of insurance as takes from him all interest therein before a loss occurs. A question, however, has been made, whether if an assured makes an assignment of the property insured, and therewith of the policy, and a loss subsequently occurs, the assignee has not acquired the right of the assured, and may not bring an action on the policy in the name of the assured, but for his own benefit. In the principal case, or at least the earliest in which an opinion to this effect is expressed, it was a mere *obiter dictum* (*Sparkes v. Marshall*, 2 Bing. N. C. 774). Far more than its due weight was given to this opinion; or as it might more properly be called, this doubt, in a subsequent case (*Powles v. Innes*, 11 M. & W. 10). Such a view however seems to be favored in one case by the Supreme Court of the United

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States, and in a Pennsylvania case. It seems to have been taken for granted, in *Spring v. South Carolina Ins. Co.*, 8 Wheaton, 268, and in *Rousset v. Ins. Co. of North America*, 1 Binney, 429, that the insurers would be liable in such cases. Judge PHILLIPS inclines to the same view, provided the policy contained no provision to the contrary; while Mr. Duer seems to avoid expressing an opinion upon the point. Chancellor KENT expresses himself thus: 'If the subject-matter of the property be assigned before loss, the policy may also be assigned, so as to give a right of action to a trustee for the assignee;' meaning, we suppose, by this that the assignee may bring an action in the name of the assignor for his own benefit, and the assignor will not be permitted to defeat or impair the assignee's right of action. He adds that in the declaration in such a suit the plaintiff may aver that he sues as a mere trustee, and that the whole interest is in others.

"These are very high authorities, but nevertheless we cannot regard this as a just view of the law on this subject. We think that some confusion has arisen from confounding the assignability of the policy itself, where there is no assignment of the subject, with the case where both policy and subject are assigned. The assignment of the policy alone stands upon the ordinary ground of an assignment of a *chose in action*. The assignment of the subject however raises a very different question. The contract of insurance is strictly a personal one. It cannot properly be called insuring the thing, for there is no possibility of doing it, and it therefore must mean insuring the person from damage. It is not an engagement to insure property from loss irrespective of ownership, but to answer for losses occurring to a certain person upon a certain subject. Where the interest of the assured ceases the policy becomes inoperative for want of a subject belonging to the assured to operate upon. If at the time of the assignment of the policy and of the subject of insurance there is an agreement on the part of the assignor to bear the risk, an insurable interest would remain in the original assured, and the policy would be sustained by that interest, and made available to the assignee. Certainly it could never be maintained that an insurance would be made good to the assignee of both subject and policy where a change of possession followed a transfer of title. The character of the person having the control of the property would be held in such a case to be a material element in the risk. Where however the transfer of property does not in any way affect the risk, the great technical difficulty remains that the underwriters have engaged to insure against loss the original assured, and not his assignee. It is difficult to perceive upon what principles the opposite view can be supported. The view that we take of the subject seems to us to be supported not only by the better reason, but by the weight of authority. A man who has sold property insured, and received its equivalent in the price, cannot be said to suffer when the property is destroyed, nor can the purchaser avail himself of the insurance, because no contract was made with him, unless the insurer assents to the transfer, and agrees to continue his liability, but subject perhaps to the revival of his obligations, if the property returns to the original insured before the loss, but not to make the insurer liable for losses occurring while the property was out of the hands of the original insured."

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“The general rule is that an insurance against fire is a *personal* contract *with the assured*: and the policy does not pass so as to continue the liability of the company to an assignee or purchaser of the property insured, unless by the consent of the underwriters or the properly authorized officers or board of the association:” *Simeral v. Dubuque M. F. Ins. Co.*, 18 Iowa, 323. “An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity with the owner or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain in case they are destroyed or damaged by fire. If therefore the assured has wholly parted with his interest before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken:” *SHAW, C. J.*, in *Wilson v. Hill*, 3 Metcalf (Mass.), 68, admitting that a transfer of the estate and assignment of the policy, with consent of the insurer, constitutes a new contract, and citing *Ætna F. Ins. Co. v. Tyler*, *supra*, and *Lynch v. Dalzell*, 3 Bro. P. C. 497; *Sadlers’ Co. v. Badcock*, 2 Atk. 554.

The general rule may be modified by agreement between the parties, buyer and seller. *Parcell v. Grosser*, Penn. State (to appear); *Shotwell v. Jefferson Ins. Co.*, 5 Bosworth (N. Y. Super. Ct.), 247 (subject of course to any prohibition, in the policy, of assignment without consent of the insurer, and subject to any condition avoiding it in case of assignment without such consent).

No. 14. — DALBY v. THE INDIA AND LONDON LIFE ASSURANCE COMPANY.

(EX. CH. 1854.)

RULE.

A CONTRACT of life assurance is not, in its essence, a contract of indemnity; and the person effecting such a contract may recover upon it, so far as it does not contravene the provisions of the Act 14 Geo. III. c. 48. If the person effecting the policy has an interest at the time of effecting it, it is immaterial that the interest has determined before the amount assured becomes due.

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Dalby v. The India and London Life Assurance Company.

24 L. J. C. P. 2-9 (s. c. 15 C. B. 365 ; 3 C. L. R. 61 ; 18 Jur. 1024).

Insurance on Life of Another not Contract of Indemnity. — Cesser of [2] Interest.

Where a party effects an insurance on the life of another, the statute 14 Geo. III. c. 48, permits him, after the death, to recover from the insurance office so much of the sum insured, and no more, as his interest in the life extended to at the time of effecting the policy ; and it is no ground for refusing payment that the interest had ceased during the life.

A policy of insurance on life is not a contract to indemnify against loss [3] like a fire or a marine policy, but is a contract to pay a definite sum in consideration of an annuity paid during the life.

This was an action on a policy of assurance, effected by the plaintiff, on behalf of the Anchor Life Insurance Company, with the defendants, for the sum of £1000, on the life of the late Duke of Cambridge. The declaration alleged, "that at the time of the making of the policy and thence until the death of the said Adolphus Frederick, Duke of Cambridge, the Anchor Life Assurance Company was interested in the life of the said Adolphus Frederick, Duke of Cambridge, to the amount so insured thereon, as aforesaid." The only plea was, "That the Anchor Life Insurance Company was not interested in the life of the said Adolphus Frederick, Duke of Cambridge, in manner and form as the plaintiff hath above thereof in the declaration in that behalf alleged."

The case was tried, before CRESSWELL, J., and on a point reserved coming before the Court, it was agreed that a bill of exceptions should be stated, as on the ruling of CRESSWELL, J., in favour of the defendants, that the Anchor Life Assurance Company was not interested in the life of the Duke, as alleged.

The facts, so far as it is material to state them, were as follows. A person of the name of Wright had effected four policies in the Anchor Life Assurance Company, on the life of the Duke of Cambridge, for sums amounting collectively to £3000. The latter company, wishing to reduce their risk, effected the present policy by way of re-insurance with the defendants. Afterwards, the Anchor Life Assurance Company made an arrangement with Wright, during the life of the Duke, by which Wright gave up all his policies with them, which were cancelled, the company agreeing to pay him an annuity during the life of himself and

his wife. The premiums on the policy, the subject of the action, were duly kept up until the Duke's death.

Bramwell (F. J. Smith with him) for the plaintiff (Nov. 27).—The plaintiff is entitled to recover on this policy, although it be assumed, for the purposes of the argument, that the interest of the Anchor Life Assurance Company in the Duke's life ceased when Wright's policies were given up. A policy for life assurance is a contract, not to make good a loss, but to pay a sum of money absolutely on the death of the party. It is, in fact, a contrivance for accumulating, not a contract for indemnity.

[ALDERSON, B.—It is difficult to say that an insurance by a man on his own life is a contract of indemnity, for on his death you cannot put him in the same state as he was before.]

An insurance by a man on his own life is a contract that he will pay a certain annuity during his life in consideration that he shall receive a definite sum at the end of it. It is a practical mode of saving and guarding against the uncertainty of life. If a man having a lease for twenty-one years now worth £500 engages with another to give him £20 a year on condition that the other shall, at the end of the lease, give him £500, such contract is valid. There can be no difference if the man has an annuity for twenty-one years instead of a lease, or if instead of making the payment of the gross sum dependent only on the expiration of the lease, it be made payable either at the running out of the lease or the death of the party. In insurance on the life of another, the premiums are calculated only on the probable duration of the life. No reduction is ever made in the amount of the premiums in insurance on a debtor's life for the chance in favour of the company of the debts being paid during the life. Insurance on the life of another is no more a contract of indemnity than an insurance on a man's own life. Policies of insurance against fire or marine risks are very distinguishable. They are essentially different in their nature. Such policies are, in terms, contracts of indemnity. In the vast majority of cases, the office has nothing to pay, and when a loss occurs it is not an absolute fixed sum to be paid; but in life policies it is always contemplated that the specified sum will be paid on the death. A life policy increases in value as the party grows older; but a policy of insurance against fire has no increase of value, and though premiums have [* 4] been paid for * twenty years, it has no saleable value. The

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premiums so paid are absolutely lost to the insured; but in a life policy, the party, on the death, gets back his premiums with interest.

[PLATT, B.—That is not true in every case. For instance, if the man insures for sixty years.]

He gets either the premiums or what he agrees to take as an equivalent. Strictly speaking, what is called life insurance is a money insurance dependent on life. A contract in consideration of an annual premium to pay a certain sum on a death was perfectly good at common law—1 Arnould on Insurance, 277. A policy on the life of another, without interest, was valid at common law. *Schweiger v. Magee*, 1 Cooke & Alcock, Ir. Rep. 182. In *Cousins v. Nantes*, 3 Taunt. 513 (p. 342, *ante*), the Court said that a wagering marine policy, interest or no interest, was valid at common law. It was necessary to pass a statute, 19 Geo. III. c. 37, to prohibit marine insurances without interest. The contract of life assurance without interest was valid at common law. The only difference made by the statute 14 Geo. III. c. 48, is, that there must be an interest at the time of effecting the policy. The object of the Act was, as stated in the preamble, to prevent mischievous gaming. Section 1 says “No insurance shall be made by any person,” &c., “on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use and benefit or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof, shall be null and void to all intents and purposes whatsoever.” This section prohibits the making of the policy without interest. It does not say it shall cease for failure of interest afterwards. Section 3 enacts “that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives or other event or events.” The true effect of section 3 is that the insured shall not recover more than the amount of his interest at the time of effecting the policy. If it applies any other time, this would follow, that a man might make a wagering policy, contrary to the policy of the Act, without any existing interest; but that if afterwards he gained an interest, he might recover to the full

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amount of his interest. Or, on the other hand, if the office paid the amount on the death of a debtor whose life was insured, it might recover back the amount from the creditor without returning the premiums, if the debtor's estate some time afterwards satisfied the claim. The leading case which it is necessary to impugn is *Godsall v. Boldero*, 9 East, 72. It turned on the unwarrantable assumption of Lord ELLENBOROUGH, Ch. J., that every contract of insurance was a contract of wagering or a contract of indemnity. A contract of insurance on a man's own life is neither the one nor the other. The only authority cited by him, *Hamilton v. Mendez*, 2 Burr. 1198, was a case of a contract of indemnity against marine risks. The decision does not turn upon the statute 14 Geo. III. c. 48, and it certainly is not in accordance with the decisions on the common law liabilities of the parties. All that the common law required to render valid a gaming policy was that it should be so stated. No doubt *Godsall v. Boldero* has been assumed to be law in many cases. *Ex parte Andrews in re Emet*, 1 Madd. 573 (16 R. R. 263), *Barber v. Morris*, 1 Moo. & Rob. 62, and *Henson v. Blackwell*, 4 Hare, 434; 14 L. J. Ch. 329. If a man insures the life of his debtor and sells the policy, no one has ventured to say that the title of the assignee would fail if the interest ceased, and yet such must be the case if *Godsall v. Boldero* be law. *Ashley v. Ashley*, 3 Sim. 149, is an authority that the assignee need not have an interest in the life.

Channell, Serj. (Partridge with him), for the defendants (Nov. 27).—It is not sufficient that the Anchor Insurance Company [*5] should have been interested in the * life of the Duke at the time of effecting the policy. In order to entitle the plaintiff to recover, the same interest, or one of a similar character, should have continued down to the time of the Duke's death. In the case of policies against loss by fire, the interest must be a continuing one — *The Sadlers' Company v. Badcock*, 2 Atk. 554; and in order that a marine policy without interest should be good at common law, it was necessary that it should state that it was made with interest or no interest. Then followed the statute 19 Geo. II. c. 37, which rendered wagering policies void, making interest necessary in sea policies down to the time of the loss. Therefore, if there be any analogy between fire or marine insurances and life policies, it would lead to the inference that in life policies also the interest must be continuing. *Godsall v. Boldero*,

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it is submitted, is good law. Lord ELLENBOROUGH did not mean to say that a life policy was a policy of indemnity at common law. His observations may be supposed to have been made with reference to the statute 14 Geo. III. c. 48, as declaring and explaining the law. Section 3 says that in cases in which the party hath an interest he may recover the amount of his interest. The word "hath" points to the time of recovery. Taking section 1 and section 3 together, the effect is that a policy of insurance on the life of a third person may be treated as a policy of indemnity: if the party has no interest in the life the contract fails; if he has less at the death than at the time of insurance he may recover only what remains; if all original interest be gone, nothing can be recovered. Therefore, the decision in *Godsall v. Boldero* is right, even if the observations of Lord ELLENBOROUGH cannot be supported to the full extent. *Godsall v. Boldero* has been followed ever since. In *Phillips v. Eastwood*, Lloyd & Goold (Irish), temp. Sugden, 270, Lord Chancellor SUGDEN treated a policy of insurance on the life of another as a contract of indemnity as between the office and the creditor. So in *Humphrey v. Arabin*, Lloyd & Goold (Irish), temp. Plunkett, 318, Lord PLUNKETT, having *Godsall v. Boldero* before him, decided that when the interest ceased the policy also failed.

Bramwell, in reply.—It is conceded by the argument for the defendants that *Godsall v. Boldero* cannot be supported on the reasons given by Lord ELLENBOROUGH. That is, in fact, giving up the authority of that case. But it is attempted to support the decision on other grounds than those used in the judgment, by reading the statute 14 Geo. III. c. 48, as not only prohibiting some contracts legal before, but as altering the nature of others which are still legal: and, therefore, that although the present policy was a legal bargain to pay £1000, the plaintiff can recover nothing. There is nothing in the statute to warrant such an interpretation.

[PARKE, B.—If we think that the interest need be a continuing one, we will hear the case further argued as to the continuance of the interest in the present case.]

The judgment of the Court (PARKE, B., ALDERSON, B., WRIGHTMAN, J., ERLE, J., PLATT, B., and CROWDER, J.) was now delivered by —

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PARKE, B. — This case comes before us on a bill of exceptions to the ruling of my Brother CRESSWELL at Nisi Prius. We learn that on the trial he reserved the important point which arose in it for the consideration of the Court of Common Pleas: that when it came on for discussion it was thought right to put it on the record in the shape of a bill of exceptions, that it may be carried, if it should be thought proper, to the highest tribunal; and we have now, after a very able argument on both sides, to dispose of it in this Court of error. It is an action on what is usually termed a policy of life assurance brought by the plaintiff, as a trustee for the Anchor Life Assurance Company, on a policy for £1000, on the life of his late Royal Highness the Duke of Cambridge. The Anchor Life Insurance had insured the Duke's life in four separate policies: two for £1000, two for £500 each, granted by that company to a Mr. Wright. In consequence of a resolution of their directors, they determined to limit their insurances to £2000, on one life, and this insurance exceeding it, they effected a policy with the defendants for £1000 by way of counter insurance. At the time the policy was subscribed [* 6] *by the defendants the Anchor Life Insurance Company had unquestionably an insurable interest to the full amount. Afterwards an arrangement was made between the office and Mr. Wright for the former to grant an annuity to Mr. Wright and his wife, in consideration of a sum of money and of the delivering up of the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot, by the payment of the premiums till the Duke's death. It may be conceded, for the purpose of the present argument, that these transactions between Mr. Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected; and that at the time of the Duke's death and up to the commencement of the suit the plaintiff had no interest whatever. This raises the very important question whether, under these circumstances, the assurance was void, and nothing could be recovered thereon. If the Court had thought some interest at the time of the Duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion. There is the usual averment in the declaration, that, at the time of the making of the policy, and thence until the death of the Duke, the Anchor

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Life Insurance was interested in the life of the Duke; and a plea that they were not interested *modo et formâ* which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. *Lush v. Russell*, 5 Ex. 203; 19, L. J. Ex. 244. We are all of opinion that it was sufficient, and but for the case of *Godsall v. Boldero* should have felt no doubt upon the question. The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life; the amount of the annuity being calculated in the first instance according to the probable duration of the life and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except where bonuses have been given by prosperous offices) the same on the other. This species of insurance in no way resembles a contract of indemnity. A policy of assurance against fire and against marine risks are both properly contracts of indemnity; the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 Geo. II. c. 37, and put an end to in all except a few cases. But at common law, before this statute, with respect to maritime risks, and the 14 Geo. III. c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager-policies and wagers which were not contrary to the policy of the law were legal contracts; and so it is stated by the Court, in the report of *Cousins v. Nantes*, to have been solemnly determined in the case of *Lucena v. Craufurd*, 2 Bos. & P. (N. R.), 269 (p. 151, *ante*), without even a difference of opinion among all the Judges. To the like effect was the decision of the Court of error in Ireland, before all the Judges except three, in *Schweiger v. Magee*, that the insurance was legal at common law. Their contract therefore, in this case to pay a fixed sum of £1000 on the death of the late Duke of Cambridge would have been unquestionably legal at common law, if the plaintiff had an interest thereon or not; and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14

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Geo. III. c. 48. This depends upon its true construction. The statute recites that the making insurances on lives and other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming, and for the remedy thereof it enacts, "that no insurance shall be made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account such policy shall be made shall have no [* 7] interest, or by * way of gaming or wagering; and that every assurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever." As the Anchor Insurance Company had undoubtedly an interest in the continuance of the life of the Duke of Cambridge, and that to the amount of £1000, because they had bound themselves to pay a sum of £1000 to Mr. Wright on that event, the policy effected by them with the defendants was certainly legal and valid; and the plaintiff, without the slightest doubt, could have recovered the full amount if there were no other provisions in the act. This contract is good at common law, and certainly not avoided by the first clause of the 14 Geo. III. c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. The question arises on the third clause. It is as follows:—"And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." Now, what is the meaning of this provision?

On the part of the plaintiff, it is said, it means only that, in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under colour of a small interest, a wagering policy might be made to a larger amount, as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest at the time of effecting the policy: Upon that value the assured must have the amount of premium calculated: if he states it truly, no difficulty can occur: he pays in the annuity for life the fair value of the sum payable

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on death. If he misrepresents by overrating the value of the interest, it is his own fault in paying more in the way of annuity than he ought, and he can recover only the true value of the interest in respect of which he effected the policy, but that value he can recover. Thus, the liability of the assurer becomes constant and uniform to pay an unvarying sum on the death of the *cestui que vie* in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to amount on both sides. This construction is effected by reading the word "hath" as referring to the time of effecting the policy. By the first section the assured is prohibited from effecting an insurance on a life, or on an event, wherein he "shall have" no interest: that is, at the time of assuring; and then the 3d section requires that he shall recover only the interest that he "hath;" if he has an interest when the policy is made he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the third clause provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void, but the prohibition to recover or receive more than that amount obviates any difficulty on that head.

On the other hand, the defendants contend that the meaning of this clause is, that he shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt. The words must be altered materially to limit the sum to be recovered to the value at the time of the death, — or, if payable at a time after death, then when the cause of action accrues. But there is the most serious objection to any of these constructions. It is that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum on the value of a then existing interest in the event of death, in consideration of a fixed annuity calculated with reference to that sum, but a contract to pay, contrary to its express words, a varying sum according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the time of the verdict or execution; and

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yet the price, or the premium to be paid, is fixed, calculated on the original fixed value, and is unvarying, so that the assured is obliged to pay a certain premium every year calculated on the value of his interest at the time of the policy, in order to [*8] have a right to recover an uncertain sum, namely, * that which happens to be the value of the interest at the time of the death, or afterwards, or at the time of the verdict. He has not therefore, a sum certain which he stipulated for and bought with a certain annuity, but it may be a much less sum, or even none at all. This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon the section. We should, therefore, have no hesitation, if the question were *res integra*, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy it is not a wagering policy, and the true value of that interest may be recovered in exact conformity with the words of the contract itself. The only effect of the statute is, to make the assured value his interest at its true amount when he makes the contract.

But it is said that the case of *Godsall v. Boldero* has concluded the question. Upon considering this case, it is certain that Lord ELLENBOROUGH decided upon the assumption that a life policy was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought; and his Lordship relied upon the decision of Lord MANSFIELD in *Hamilton v. Mendez*, that the plaintiff's demand was for an indemnity only. Lord MANSFIELD was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not the nature of what is termed an assurance for life; it really is what it is on the face of it, a contract to pay a certain sum in the event of death. It is valid at common law, and, if it is made by a person having an interest in the duration of the life, is not prohibited by the statute 14 Geo. III. c. 48. But though we are quite satisfied that the case of *Godsall v. Boldero* was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a Court of error, if it had been approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it

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had not been disputed in practice, and had been cited by several eminent Judges as established law. The judgment itself was not and could not be questioned in a Court of error, for one of the issues, *nil debet*, was found for the defendant. Since that case, we know practically, and that circumstance is mentioned by one of the Judges in the cases hereinafter referred to, that the insurance offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interest to do so. They have, therefore, generally speaking, paid the amount of those life insurances, so that the number of cases in which it could be questioned is probably very small indeed; and it may be truly said, instead of the decision in *Godsall v. Boldero* being uniformly acquiesced in and acted upon, it has been uniformly disregarded. Then, as to the cases. There is no case at law, except that of *Barber v. Morris*, in which the case of *Godsall v. Boldero* was incidentally noticed, as proving it to be necessary that the interest should continue till the death of the *cestui que vie*. It was proved in that case to be the practice of the particular office in which that assurance was made to pay the sum assured without inquiry as to the existence of an insurable interest, and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment in not disclosing that the interest had ceased. This was the point of the case, and though there was a dictum of Lord TENTERDEN that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case. The other cases cited on the argument in this case were cases in equity, where the propriety of the decision of *Godsall v. Boldero* did not come in question. The questions arose as to the right of the creditor and debtor *inter se* when the office had paid the value of a policy. *Humphrey v. Arabin*, *Henson v. Blackwell*, and *Phillips v. Eastwood*, where the point decided was that a life policy, as a security for a debt, passed under a will bequeathing debts, — the LORD CHANCELLOR stating that the offices found it not for their benefit to act on the rigid rule of *Godsall v. Boldero*. In these cases the different Judges concerned in them do not dispute, — some, indeed, appear to approve * of the case [* 9] of *Godsall v. Boldero*, but it was not material in any way to controvert it, and the questions to be decided were quite indepen-

dent of the authority of that case. We do not think that we ought to feel ourselves bound, sitting in error, by the authority of that case, which itself could not be questioned by writ of error; and as so few, if any, subsequent cases have arisen in which the soundness of the principle then relied upon could be made the subject of judicial inquiry, and as in practice it may be said that it has been constantly disregarded. *Venire de novo.*

ENGLISH NOTES.

The Life Assurance Act, 1774 (14 Geo. III. c. 48), enacted for England and Scotland, and afterwards extended to Ireland by the Life Insurance (Ireland) Act, 1866 (29 & 30 Vict. c. 42) enacted as follows:—

“1. From and after the passing of this Act, no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made, contrary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.

“2. It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote.

“3. In all cases where the insured hath interest in such life or lives, event or events; no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.”

To satisfy the Statute 14 Geo. III. it is necessary that the assured have a pecuniary interest in the life, so that the expectation under a bare promise, made without consideration, does not constitute a sufficient interest under the statute. And the assured cannot recover from the insurers (whether upon one policy or different policies), more than the insurable interest which the person making the insurance had at the time when he effected the insurance. *Hebden v. West* (1863), 3 B. & S. 579, 32 L. J. Q. B. 85, 9 Jur. (N. S.) 747, 7 L. T. 854, 11 W. R. 422.

It has never been doubted that a person has an unlimited interest in his own life.

It has been laid down by Lord KENYON that every wife has an inter-

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est in the life of her husband. *Reed v. Royal Exchange Assurance Co.* (1795), 2 Peake, 70.

Whether a husband has an insurable interest in the life of his wife has been doubted by some text writers in England. It is assumed by Leake (on Contracts, p. 656), that he has such an interest, just as he has in his own life, and as the wife has in her husband's life. That the husband has such an interest is also assumed by Lord Moncrieff in a Scotch case, *Wight v. Brown* (1849), Court of Session cases, 2d series, vol. 11, p. 459, 470.

By the Married Women's Property Act 1870 (33 & 34 Vict. c. 93, s. 10), it was expressly enacted that a married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use; and it was also enacted that a policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife and children or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them according to the interest so expressed. Similar enactments were made for Scotland by the Married Women's Policies of Assurance (Scotland) Act 1880 (43 & 44 Vict. c. 26). And similar enactments are contained in the Married Women's Property Act 1882 (45 & 46 Vict. c. 75, s. 11), which is now in force in England.

Where a creditor takes an assignment of a policy on the life of his debtor, or insures the life in his own name, and pays the premiums, debiting them to the debtor, it is to be presumed that the benefit of the policy belongs to and is redeemable by the debtor. *Scottish Union Insurance Co. v. Marquis of Queensberry* (1842), 4 Macq. 183, *Drysdale v. Piggott* (1856), 8 De G. M. & G. 546, 25 L. J. Ch. 878, 2 Jur. (N. S.) 1078. It would appear that, in accordance with the Act, the creditor could not insure in his own name a larger sum than the debt; but if the insurance was made for a larger sum and the amount was not disputed by the company, the benefit would enure to the representatives of the debtor. This appears in a Scotch case in which the *North British and Mercantile Insurance Co.* brought the money into Court, for the Court to determine the right as between debtor and creditor; and the Court held that the right of the latter in the policy was a mere right in security, and that the residue must be paid to the representatives of the debtor. *Lindsay v. Barncliffe* (1851), 13 Dunlop (Court of Session Cases, 2d series), 718.

It may be here noted, that whatever may be the interest of the person assured in the life of another, public policy does not allow that he should benefit by the death of that other, brought about by his own crime. See *Fauntleroy's Case*; *Amicable Assurance Society v. Bolland*

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(1830), 2 Dow & Cl. 1; *Cleaves v. Mutual Reserve Fund Life Ass. Co.* (C. A. 1891), 1892, 1 Q. B. 147, 61 L. J. Q. B. 128.

AMERICAN NOTES.

The principal case is largely quoted from and commented on in May on Insurance, sect. 115 *et seq.*, together with *Godsall v. Boldero*, 9 East, 72. In regard to the adoption of this principle in this country that writer says (sect. 117): "The courts of this country have however as we have seen, almost without exception refused to adopt the doctrine of the English common law in support of policies without interest, and it remains to be seen whether they will so far modify the rule as to uphold a policy where the insured has an interest when the contract is made, but has none when the event happens upon which the policy becomes payable. That the insurable interest need not have uninterrupted continuity, but may revive after suspension, has before been adverted to. In the Supreme Court of the United States it was recently said that the contract of life insurance was not one of mere indemnity, and that an insurable interest was only necessary at the inception of the contract. But the point decided was simply that that court would not exercise its equity power when there was an adequate remedy at law; and the cases referred to as supporting the *dictum*, with the exception of the English case, are not authorities, since in all of them, in point of fact, the interest existed at the time of the death as well as at the inception of the contract. There are *dicta* however in the New York and New Jersey cases referred to, as also in other cases, which would seem to support the view that a continuing interest in a life policy is not necessary. Upon the whole it is not improbable, that when the point is distinctly taken, it will be held that when the contract at its inception is based upon a substantial interest, and is in good faith entered into for the protection of that interest, it is not objectionable as a wager contract, and may be enforced though the interest may have ceased at the time of the death. And this is the more probable as while such a rule will keep the door shut against mere gambling and speculation, it will tend to encourage what is now almost universally regarded as a provident contract, securing not only an indemnity in case of loss, but the means of presently increasing capital, and a not disadvantageous mode of investment. So it has now been distinctly held in the Supreme Court of the United States (and later cases in Pennsylvania and the United States courts make the authority to this point very emphatic)." The conclusion is, upon all the authorities, that life insurance, like all other kinds of insurance, is a contract of indemnity; but that that form of the contract, in some of its phases, is not merely a contract of indemnity, but includes that with a possibility of something more. It can never therefore properly be entered into except for the purpose of security or indemnity; though the fact that the contract may, under certain circumstances, result as a profitable investment, does not vitiate it, if entered into in conformity to the principles which underlie it. But so far as it seeks any other object than indemnity for loss, it departs from the legitimate field of insurance, and engrafts upon that contract a purpose foreign to its nature."

The decisions in this country are almost unanimous that a valid insurance

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cannot be effected by one on the life of another unless he has an interest in that life. A few to the contrary are cited *ante*, p. 000. But what constitutes an insurable interest is a question that has given rise to much litigation and considerable conflict, — a question which is not in point at this place.

On the question whether an insurance effected by one on his own life, he paying the premiums, may be made to run to or be assigned to another who never had any interest in that life, the decisions are in decided conflict. (This question is more radical than that presented by the principal case, which contemplates at least an interest at the moment of effecting the insurance.) In the affirmative of this question are the courts of Mississippi: *Murphy v. Red*, 64 Mississippi, 614; 60 Am. Rep. 68; Illinois: *Bloomington, &c. Ass'n v. Blue*, 120 Illinois, 121; *Martin v. Stubbings*, 126 Illinois, 387; 9 Am. St. Rep. 620; Massachusetts: *Mutual L. Ins. Co. v. Allen*, 138 Massachusetts, 24; 52 Am. Rep. 245; Wisconsin: *Bursinger v. Bank of Watertown*, 67 Wisconsin, 75; 58 Am. Rep. 848; New York: *Valton v. National Fund, &c. Ass'n*, 20 New York, 32; *Olmsted v. Keyes*, 85 *ibid.* 593; Rhode Island: *Clark v. Allen*, 11 Rhode Island, 439; 23 Am. Rep. 496; Connecticut: *Fitzpatrick v. Hartford L. Ins. Co.*, 56 Connecticut, 116; 7 Am. St. Rep. 288; Ohio: *Eckel v. Renner*, 41 Ohio State, 232; Louisiana: *Succession of Hearing*, 26 Louisiana Annual, 326; Pennsylvania: *Northwestern M. A. Soc. v. Jones*, 154 Penn. State, 99; 35 Am. St. Rep. 810; Michigan: *Heinlein v. Imperial L. Ins. Co.*, 101 Michigan, 250; 45 Am. St. Rep. 409; 25 Lawyers' Rep. Annotated, 627; Indiana: *Amick v. Butler*, 111 Indiana, 578; 60 Am. Rep. 723 (*obiter*); Maryland: *Whitridge v. Barry*, 42 Maryland, 150. This is also laid down, *obiter*, by the United States Supreme Court, in *Connecticut M. L. Ins. Co. v. Schaefer*, 94 U. S. 460: "There is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend." And in *New York L. Ins. Co. v. Armstrong*, the same Court said: "A policy of life insurance without restrictive words is assignable by the assured for a valuable consideration equally with any other *chose in action*, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies." And in *Robinson v. U. S. M. A. Ass'n*, 68 Federal Reporter, 825, it was held that "where one effects an insurance upon his own life, and in the policy designates another as the payee, the latter may maintain an action on the policy without showing an insurable interest." So, in *U. S. M. A. Ass'n v. Hodgkin*, District of Columbia, 22 Wash. L. Rep. 789; *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 272. In Texas the Court goes further, and holds that a policy is not rendered a wager when applied for by the beneficiary, although the beneficiary has no interest, and pays the premiums: *Mut. L. Ins. Co. v. Blodgett*, 8 Texas Civ. App. 45. To the contrary: — Indiana: *Franklin L. Ins. Co. v. Hazzard*, 41 Indiana, 116; 13 Am. Rep. 313; Kansas: *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kansas, 93; 26 Am. Rep. 761; Kentucky: *Basye v. Adams*, 81 Kentucky, 368; Alabama: *Helmetag v. Miller*, 76 Alabama, 183; 52 Am. Rep. 316; Virginia: *Roller v. Beam*, 86 Virginia, 512; 6 Lawyers' Rep. Annotated, 136. The editor of the American State Reports, in a note in 16 Am. St. Rep. 906, prefers this doctrine as the "better rule" and "better reasoning," but cites Pennsylvania cases to it which do not support it, and *Cammack v. Lewis*, 15 Wallace (U. S. Sup. Ct.), 643, a case of a creditor taking

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out a policy for three thousand dollars on his debtor's life to secure seventy dollars, which was held a mere wagering policy; and *Warnock v. Davis*, 104 United States, 775, which was a case of one procuring insurance on his own life and assigning to one having no insurable interest in it, and agreeing to pay all the premiums, — which amounted to the assignee's procuring the insurance. The Court in the last case, it is true, disapproved the doctrine of the New York cases above cited; but it seems to be *obiter*, for they were cases where the premiums were paid by the insured. (It is somewhat difficult to determine the precise position of this Court on this point.) It seems to me however that the great preponderance of authority and the weight of reason is with the affirmative.

An excellent general note on this subject is in 52 Am. Rep.

The precise doctrine of the principal case has been adopted here. Thus in *Loomis v. Eagle, &c. Ins. Co.*, 6 Gray (Mass.), 396, it was held that a father has an insurable interest in the life of his minor son, *SHAW*, Ch. J., citing the principal case, and considering that it overruled *Godsall v. Boldero*. (In respect to the latter, the Court observed that the Massachusetts Court in a previous case had "remarked that perhaps it was influenced by the consideration that it was the true purpose of the government, in honor of a distinguished public servant, that no one should suffer by the non-payment of Mr. Pitts' debts, so that when the original creditors were paid, it was in furtherance of the purposes of the country that another party should not be declared liable." This reasoning might just as well have been applied to the case of Daniel Webster and the State of Massachusetts, as that great statesman was in debt by reason of his neglect of his own affairs in attending to those of his State.) Reference was made in that case to *Lord v. Dall*, 12 Massachusetts, 115; 7 Am. Dec. 38, which held that a wife had an insurable interest in the life of her brother, on whom she was dependent, although he was thus insured while engaged in an immoral and unlawful traffic, she being ignorant thereof.

In *Rawls v. Am. M. Life Ins. Co.*, 27 New York, 287, it was held that an insurance to a creditor on the life of his debtor subsists, although the Statute of Limitations might have barred his action before the debtor's death. The Court observed: "It is not at all necessary to discuss the question whether a policy obtained by a party having no interest in the life insured would be void, either at common law or under our statute against betting and gaming. It may be conceded that at common law it would be a wager policy, and void, although it was distinctly held in the Exchequer Chamber, on error, in *Dalby v. India and London Life Assurance Co.*, 80 Eng. Com. Law, 365; s. c. 28 Eng. Law & Eq. 312, that such an assurance was legal at common law. But the case is not embarrassed by any such question. It was distinctly shown, and the proof in no way controverted, that the plaintiff was a creditor of Fish when the insurance was effected in an amount far exceeding the amount named in the policy, and that at the time of the trial the debt was still wholly unpaid. He had therefore within all the cases an insurable interest in the life of Fish sufficient to support the policy. It was in no legal sense a wager contract.

"Nor is it necessary to consider the question whether a life policy is in its

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nature a contract of indemnity, as marine and fire policies undoubtedly are. Regarding the policy in this case as substantially a contract of indemnity against the loss of the plaintiff's debt, and that as an interest was required to support its inception, a continuance of that interest is essential to its perpetuity, there was no pretence that the debt or any part of it had been paid. All that the case showed was that the Statute of Limitations had apparently run against the demand of the plaintiff at the death of Fish. But suppose the statute had attached, the interest of the plaintiff as a creditor in the continuance of the life of his debtor had not ceased entirely. The debt was not extinguished as in the case of payment. It might be renewed by a new promise, and indeed without such promise, be enforced by action, unless the defence of the statute was directly interposed. It is not a legal presumption that when the Statute of Limitations has once run the debtor will refuse to revive the debt by a new promise, or interpose the defence of the statute in an action to recover it.

“But in the contract of life insurance it is enough that the party effecting the policy had an insurable interest at its inception; and it is not required that that interest should continue and exist at the time of the death of the person whose life is insured, to entitle the holder of the policy to recover. Policies of insurance against fire and marine risks are properly contracts of indemnity, — they are so in terms; but it is otherwise with life policies. The contract, says PARKE, B., in *Dalby v. India and London Life Assurance Co.*, 28 Eng. Law & Eq. 312, commonly called ‘life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life; the amount of the annuity being calculated in the first instance according to the probable duration of life. . . . This species of assurance in no way resembles a contract of indemnity.’ Indemnity being the general principle which gave rise to fire and marine insurance, by a mistaken analogy such a principle was at one time recognized in life insurance. This recognition grew out of the decision in *Godsall v. Boldero*, 9 East, 72, decided in the King's Bench in 1807, which was followed and adopted by text writers on assurance both in England and in this country, but which was overruled, on error to the Exchequer Chamber, in 1854, in the case of *Dalby v. India and London Life Assurance Co.*, *supra*. In the latter case it was held that a life policy was not in its nature a contract of indemnity, but was what it purports to be on its face, — a contract to pay a certain sum in the event of death; and if made by a person having an interest in the duration of the life, it was sufficient to make it valid in point of law that that interest existed at the time of making the policy. It seems remarkable to me that any other view should be taken of the question. The contract is not to make any loss good, or to make compensation. The debt is not insured. It is an absolute contract to pay, not the amount of a loss or damage arising from a death, but a specified sum of money upon the termination of the life insured.”

In *Insurance Co. v. Bailey*, 13 Wallace, 616, the United States Supreme Court said, citing the principal case: “The better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have

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some pecuniary interest in the life of the *cestui qui vie* " (meaning, as is apparent from the context, at the time of the death) " are founded in an erroneous view of the nature of the contract, that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies, that it is sufficient to show that the policy is not invalid as a wager policy, if it appears that the relation, whether of consanguinity or of affinity, was such between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or mutual affection, in the life of the person insured. Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the insurance had an insurable interest, — such as is described in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies." The principal case was cited by the same, in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, as " a lucid judgment," to the decision that an insurance by a wife upon her husband's life was not avoided by their absolute divorce. Citing *Loomis v. Eagle, &c. Ins. Co.*, *supra*, and observing: " We do not hesitate to say however that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself."

This is the doctrine of Maryland. *Rittler v. Smith*, 70 Maryland, 261; 2 Lawyers' Rep. Annotated, 844, citing the principal case.

In *Siegrist v. Schmoltz*, 113 Penn. State, 326, it was very concisely held that one who is neither a relative nor a creditor, but merely agrees to support the assured during life, may not retain out of the insurance moneys more than the amount of his expenditures, and the balance belongs to the estate of the assured. This seems to have been put on the ground that the claimant was interested in shortening the life of the assured, and that " public policy " forbade his recovery beyond that amount. And so of an assignee of a life policy. *Helmetag v. Miller*, 76 Alabama, 183; 52 Am. Rep. 316. But in *Wright v. Mut. B., &c. Ass'n*, 118 New York, 237; 16 Am. St. Rep. 749, it was held that the assignee of the creditor payee may recover the whole amount, although the debt was less.

In *Equitable Life Ins. Co. v. Hazlewood*, 75 Texas, 338; 16 Am. St. Rep. 893, it was held that a beneficiary named in a policy who has no insurable interest can hold as trustee, but a creditor by assignment can only hold to the extent of his debt. " The assignment of a valid policy to one having no insurable interest in the life insured, does not invalidate the policy." Want of insurable interest in an assignee of a life policy does not release the insurer: he must perform his contract, leaving the law to dispose of the proceeds among the persons found entitled thereto. *Cheeves v. Anders*, 87 Texas, 287; 47 Am. St. Rep. 107; *Curtiss v. Aetna L. Ins. Co.*, 90 California, 245; 25 Am. St. Rep. 114.

SECTION II. — *Insurance Agents. Their Powers, Rights, and Liabilities.*No. 15. — SMITH *v.* LASCELLES.

(K. B. 1788.)

RULE.

THE correspondent (A.) at home of a merchant (B.) abroad is bound to obey an order of the merchant to insure goods, (1) Where B. has effects in the hands of A.; (2) Where A. has been in the habit of complying with such orders; or, (3) Where B. has sent bills of lading to A. with an order to insure as the implied condition on which A. is to receive the goods under the bills of lading.

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2 Term Reports 187–190 (1 R. R. 457).

Insurance. — Directions to Insure. — Liability of Agent.

A merchant abroad, having effects in the hands of his correspondent [187] here, may compel him to procure an insurance for him. If a merchant here has been accustomed to procure insurances for his correspondent abroad in the usual course of trade, the latter has a right to expect an insurance at the hands of the former, unless some previous notice be given to the contrary. If a merchant abroad send bills of lading to his correspondent here, and at the same time give directions to procure an insurance, the latter cannot accept the bills of lading without obeying the orders to insure.

If a merchant abroad, interested in goods and the freight of a cargo, mortgage them to his creditor here for payment of money at a certain day, and by letter, inclosing the bills of lading, direct him to insure, the latter will be liable to an action for not insuring, notwithstanding the mortgage was become absolute before the letter was received.

Case for neglecting to make an insurance on the freight of goods shipped on board the *General Melville*, from Dominica to London. Plea, the general issue. A verdict having been given for the plaintiff at the sittings at Guildhall after last term.

Law now moved to set it aside, and stated that the following circumstances appeared at the trial. The plaintiff, being indebted

to the defendant in £850, in February, 1785, mortgaged to him his interest in the goods and freight by way of security ; in which mortgage was contained a proviso that the deed should be void in case of payment in August, 1785. In July, 1785, the plaintiff, in a letter inclosing the bills of lading, desired the defendant

to procure an insurance on the goods and freight, which [* 188] * letter could not have been received before the mortgage became absolute. The defendant did cause insurance to be made on the goods, though not on the freight. At the trial, proof was given of a letter having been received by the defendant from the plaintiff, but it did not appear whether it was the letter in question. Three grounds were now made for a new trial. 1st, That it had not been satisfactorily proved that any order to insure had been received. 2dly, That, supposing the letter to have been received, the plaintiff had no insurable interest; the defendant having insured the goods on his own account, and the mortgage at that time being forfeited. 3dly, But if the plaintiff had an insurable interest, the defendant was not bound to obey the plaintiff's directions to insure. So far from the defendant having money of the plaintiff's in his hands, the latter was actually indebted to him, and therefore he could not be compelled to give him a larger credit.

ASHHURST, J. — The plaintiff had only mortgaged his interest in the goods and freight to the defendant; and therefore, although the defendant may have insured the legal interest on his own account, he might also have insured the equitable interest remaining in the plaintiff on the plaintiff's account. It is true, indeed, that one person cannot compel another to make an insurance for him against his consent; but if the directions to insure be given to him, to whom the application would naturally be made in the usual course of trade, and he do not give notice of his dissent, he must be answerable for his neglect, because he deprives the other of any opportunity of applying elsewhere to procure the insurance.

BULLER, J. — This is not the first question of the kind that has come before me at Guildhall. In a case which arose near two years ago,¹ I stated very fully to the jury the law respect-

¹ *Wallace v. Tellfair*, *Sittings at Guildhall* after Tr. 1786, cor. BULLER, J. In that case BULLER, J., laid down the same principles; and also ruled that, where a merchant here had accepted an order for insurance, and limited the broker to too

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ing *the obligation under which a merchant resid- [*189]
ing in this country is, to insure for his correspond-
ent abroad, which I repeated in a great measure in this case.
It is now settled as clear law, that there are three instances

small a premium, in consequence of which no insurance could be procured, he was liable to make good the loss to his correspondent.

The following case was decided at the same Sittings at which *Smith v. Lascelles* was tried, and relates to the same question:

Smith and Others v. Cologan and Another. This was an action on the case for neglecting to make an insurance on goods. The question was, Whether the defendants had done their duty properly in the manner in which the insurance had been procured? BULLER, J. The foundation of this action is negligence in the defendants, by which the plaintiffs have been injured. The defendants were the correspondents of the plaintiffs. As to the orders for insurance having been received and accepted there is no doubt. The only question is, Whether the defendants have been guilty of negligence at any period of time which will make them liable? The defendants received the orders in 1782, and they sent Anderson, their broker, to Lloyd's Coffee-house, to get the insurance effected; but he could not get it done from five to six guineas, which was the premium which he offered. This was not because the premium offered was too low for such a risk, but because the underwriters would not engage in the risk at all, on account of the ship's not being registered at Lloyd's. Now if the defendants, who lived in London, had gone no further, and done nothing else, it might have been a considerable doubt whether they would have been liable; for if a person to whom such orders are sent do what is usual to get the insurance made, that is sufficient, because he is no insurer, and is not obliged to get insurance at all events. But whether, by usage, it were incumbent on the defendants in this case to apply to the public offices, is not material to be considered, because they went further, and the plaintiffs have

adopted their acts. The next step they took (as it was now a forlorn hope) was to write to G. K. and Co. who were the ship-owners, living at Newcastle, thinking them the most likely persons to be able to get the insurance done; which they accordingly did on the 5th of October, 1782. So far from being to blame in this, the defendants acted very meritoriously. When the loss was known, they endeavoured to get the policy out of the hands of G. K. and Co. and they applied repeatedly, but could not succeed; no diligence was wanting on their parts; but the answer was that G. K. and Co. had other sums to recover upon the same policy, and therefore could not let it out of their hands. Fresh application was made in 1782, to which G. K. and Co. sent an answer, which is indeed an evasive one; but the defendants had no means of obliging them to give it up, but by bringing an action, and it can hardly be said that not doing so is negligence in them. If the defendants had made a blunder in the insurance which would have avoided the policy, that would have been negligence; but the policy is a good one; and it was only owing to the knavery and failure of G. K. and Co. that the plaintiffs have lost the benefit of it, for the underwriters have actually paid the loss to G. K. and Co. In the midst of these transactions, one of the plaintiffs came home; all the business was laid before him by the defendants; he approved of their conduct; he took up the affair, and considered Anderson as his agent. Now if, with a knowledge of all the circumstances, he adopted the defendant's acts for a moment, he ought to be bound by them. If he had intended to insist on his right to recover the money from the defendants he should never have looked to others at all. But afterwards, when G. K. and Co. were likely to fail, then he considers the defendants as his debtors.

Verdict for the defendants.

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in which such an order to insure must be obeyed. First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them [*190] be such that the one *has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing. 3dly, If the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true, as it has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent here cannot accept it in part, and reject it as to the rest. If such be the law on this subject, the fact in this case is clear; for, with regard to the letter, there is no pretence for saying that any other was received by the defendant from the plaintiff but that containing the order of insurance; and the jury have so found it.

GROSE, J., of the same opinion.

Rule refused.

ENGLISH NOTES.

Where merchants in London receive from a stranger residing abroad a bill of lading of goods, in a letter requesting them to effect insurance and sell the goods; if they deal with the bill of lading they are bound to insure and sell according to the terms of the consignment. They cannot, by indorsing the bill of lading, constitute another person the agent of the consignors so as to avoid being themselves liable as agents. *Corlett v. Gordon* (1813), 3 Camp. 472, 14 R. R. 813.

Where agents were directed to insure goods so as to include loss by British as well as foreign capture, and to insure the premium; if they insure the goods without the premium, and an action is brought for negligence, they cannot set up as a defence that the instructions

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included insurance against British capture; because, if they had followed the instructions, the insurance would not have been illegal, but only void *pro tanto*. *Glaser v. Cowie* (1813), 1 M. & S. 52.

The following observations of TINDAL, Ch. J., in the case of *Chapman v. Walton* (1833), 10 Bing. 57, 63, are important upon the duties, generally, of an insurance broker. The action was for negligence in not procuring the proper alterations in a policy of insurance according to instructions. The CHIEF JUSTICE said: "The action is brought for the want of reasonable and proper care, skill, and judgment shewn by the defendant, under certain circumstances, in the exercise of his employment as a policy broker. The point, therefore, to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further enquiry, viz., whether other persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant. For the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it; and it appears to us that it is not only an unobjectionable mode, but the most satisfactory mode, of determining this question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant."

It is the duty of a person who is in the position of a general agent for effecting insurance, — if he receives instructions to insure upon special terms and fails in obtaining those terms, — to give notice within a reasonable time to his employer, in order that the employer may give fresh instructions, or otherwise act as he thinks fit. *Callander v. Oelricks* (1838), 5 Bing. N. C. 58, 6 Scott, 761.

By the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 97, (1), a penalty is imposed upon every person making a sea insurance, or paying or becoming liable to pay any premium for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped:— (2) Every broker, agent, or other person negotiating or transacting any sea insurance contrary to the intent of the Act, or writing any policy of sea insurance upon material not duly stamped, incurs a fine, and has no legal claim for any brokerage or money paid by him with reference to the insurance.

The rule laid down by the House of Lords in *Ireland v. Livingstone* (1871), L. R. 5 H. L. 395, 41 L. J. Q. B. 201, 27 L. T. 79, is doubtless applicable to insurance as well as other transactions: — namely, that

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where parties are in the relation of principal and agent, and the agent, in carrying out instructions of doubtful meaning, *bonâ fide* adopts one of the meanings of which the instructions are susceptible and carries them out accordingly, he must be considered, as between himself and the principal, to be justified in what he did.

AMERICAN NOTES.

This case is cited in 1 May on Insurance, sect. 124, with the remark that the agent, "it scarcely need be said, is responsible to his principal for every negligence in the performance of his duties." And in 1 Biddle on Insurance, sect. 18, as to habit; and by Mechem on Agency, sect. 510, to all points of the Rule.

The agent's habit will control in absence of instructions: *Walsh v. Frank*, 19 Arkansas, 270; *Lee v. Adsit*, 37 New York, 78; *Area v. Milliken*, 35 Louisiana Annual, 1150; *Shoenfeld v. Fleisher*, 73 Illinois, 404; *Shirliff v. Whitfield*, 2 Brevard (So. Car.), 71; 3 Am. Dec. 701. If there is no instruction, custom, or understanding, he is not bound to insure: *Lee v. Adsit*, *supra*. And if his custom is only to insure when ordered by letter, a promise by an agent of the consignees to write to them to obtain insurance, which he did not fulfil, does not render the consignees liable: *Randolph v. Ware*, 3 Cranch (U. S. Sup. Ct.), 503.

"But if he accepts a consignment with instructions from his principals to insure for their benefit, it becomes his duty to insure; and if he neglects to do so, and a loss occurs he is liable to them for the amount:" *Shaw v. Ætna Ins. Co.*, 49 Missouri, 580. So in *Sawyer v. Mayhew*, 51 Maine, 398; *Perkins v. Wash. Ins. Co.*, 4 Cowen (N. Y.), 645; *DeTastett v. Crousillat*, 2 Washington (U. S. Circ. Ct.), 132; *Thorne v. Deas*, 4 Johnson (N. Y.), 84; *Shoenfeld v. Fleisher*, 73 Illinois, 404; *Gordon v. Wright*, 29 Louisiana Annual, 812; *Morris v. Summerl*, 2 Washington (U. S. Circ. Ct.), 203; *Manny v. Dunslop*, Woolworth (U. S. Circ. Ct.), 372.

"The law is clear that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but as if he himself were the underwriter, and he is of course entitled to the premium. *DeTastett v. Crousillat*, *supra*.

In *Thorne v. Deas*, *supra*, KENT, Ch. J., cited the principal case, and quoted with approval the three instances stated by BULLER, J. (and in the Rule), in which the agent is bound to insure, with the observation: "The case itself, which gave rise to these observations, and the two cases referred to in the note to the report, were all instances of *misfeasance*, in proceeding to execute the trust, and in not executing it well. But I shall not question the application of this rule, as stated by BULLER, to cases of *non-feasance*, for so it seems to have been applied in *Webster v. DeTastett* (7 Term Rep. 157)." But he held that the doctrine had no application to the case at bar, because that was the case of a joint-owner neglecting to insure according to his voluntary undertaking.

No. 16. — *Power v. Butcher*, 10 Barn. & Cress. 329. — Rule.

No. 16. — *POWER v. BUTCHER.*

(K. B. 1829.)

RULE.

ACCORDING to the ordinary course of dealing between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premiums to the broker, nor does the latter pay the underwriters. But as between the assured and the underwriter the premiums are considered as paid. As between the insured and the broker the premiums are a debt, as if the broker had actually paid the premium to the underwriter at the request of the assured.

Power and another v. Butcher and another.

10 Barn. & Cress. 329–348 (s. c. 5 Man. & Ry. 327).

Insurance. — Right of Agent to indemnity for Premiums.

An insurance broker effected, on behalf of another person, a policy [329] under seal, with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized as owner, agent, or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such assurance, had covenanted with the company to pay the premium, and then alleged that, in consideration of the premises and of such covenant, the policy was effected. The broker having become bankrupt, without having paid the premium to the company, it was held that his assignees were entitled to recover from the assured the amount of the premium which he had covenanted to pay.

The declaration stated that the defendants were indebted to the bankrupt before his bankruptcy for work and labour, as an insurance broker, and for divers premiums of insurance due and payable from the defendants to the bankrupt, for and in respect of his having underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the said defendants, at their request. The plaintiffs, by their particulars of demand, claimed to recover for insurance. The company would have allowed the broker, when he paid the premiums, to deduct £31 1s. as commission: *Held*, that his assignees were entitled to recover that sum under the words in the declaration, “work and labour” done by the broker, and under the word “insurance,” in the particulars of demand.

Held, also, that the assignees were entitled to recover the amount of the premiums which the bankrupt had become liable to pay to the company under that part of the count which charged that the defendants were indebted to the

 No. 16. — *Power v. Butcher*, 10 Barn. & Cress. 329–331.

plaintiffs for premiums due to the bankrupt for and in respect of his having caused and procured to be underwritten divers policies; but that the plaintiffs were not entitled to recover such sums under the count for money paid, because the broker had not actually paid the sums, or done anything which was equivalent to payment.

Assumpsit. The first count of the declaration stated that the defendants were indebted to T. Fulton, before he became [* 330] a bankrupt, for work and labour by * him bestowed in and about the writing, drawing, and making out of divers policies of insurance of divers ships, &c., before that time written, drawn, and made out by the said T. Fulton, as an insurance broker; and in about the causing and procuring divers persons to insure divers sums of money upon the said ships, &c., at the special instance and request of the defendants; and for divers sums of money before that time advanced and paid by T. Fulton for the defendants, at their like special instance and request, to divers persons, as and for certain premiums and rewards for the underwriting and subscribing the said policies of insurance before that time underwritten and subscribed for the insurance of the said ships, and during certain voyages undertaken by the said ships, &c.; and for the trouble, care, and diligence of the said T. Fulton in that behalf, at their like special instance and request; and for divers premiums of insurance, and sums of money before that time and then due and payable from the defendants to T. Fulton, for and in respect of T. Fulton having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the defendants, at their like special instance and request. There were counts for premiums paid for insurances, common counts for work and labour, money counts and upon an account stated. Plea, general [331] issue, by both defendants. There was a separate plea by Butcher that in another action a certain sum of £5 15s. had been paid and accepted in satisfaction. At the trial before Lord TENTERDEN, CH. J., at the London sittings after Michaelmas Term, 1828, the jury found a verdict for the plaintiffs, with £621 10s. damages, subject to the opinion of this Court on the following case:—

The defendants were ship-owners; Fulton, the bankrupt, carried on business as an insurance broker at Lloyd's coffee-house, and was employed by the defendants to effect the policies, and the bankrupt accordingly effected the same at the premiums mentioned in the following account:—

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Oct. 22, 1825,	Insurance	£3000, Hunteliffe,	at £12 0	£360 0
Ditto,	Ditto,	600, Ditto,	2 5	13 10
Nov. 2, 1825,	Ditto,	2000, Julius Cæsar,	12 0	240 0
Ditto,	Ditto,	100, Fame,	1 5	1 5
Nov. 14, 1825,	Ditto,	300, St. Lawrence,	1 10	4 10
Ditto,	Ditto,	500, Fame,		7 10

* A copy of this account formed the particulars of the [* 332] plaintiffs' demand in the action against Butcher alone, which is hereafter mentioned, and a copy of the same account, except the two items of £1 5s. and £4 10s., formed the particulars of demand in the present action. These policies were severally effected by the said bankrupt with the "Indemnity Mutual Marine Insurance Company," and, by each of the policies, which were all under the seal of that Company, it was recited that the bankrupt, upon his representation that he was interested in or duly authorized as owner, agent or otherwise, to make assurance upon the vessel mentioned in each policy, and desirous of making such assurance, had covenanted with the company to pay the premium in respect of each of the said several and respective policies to the company; and it was alleged, that in consideration of the premises, and of such covenant, each of the policies was effected. The names of the defendants were not mentioned in any of the policies, each of which purported to be made with the bankrupt. The bankrupt paid to the company sums of £1 5s. and £4 10s. in respect of the policy of £100 on the Fame, and that of £300 on the Saint Lawrence, but did not pay any of the other premiums. The bankrupt was at the time of effecting the policies a member of the company. The defendants neither were nor had been members of the company; and by the rules of the company none but members were allowed to effect insurances. The commission due to the bankrupt in respect of the policies amounted to £31 1s., which sum the bankrupt would have been entitled and allowed by the company to deduct and retain from the amount of the premiums to be paid by him to *the company. In [* 333] the year 1826, the plaintiffs commenced an action against Butcher, one of the present defendants, to recover from him the before-mentioned premiums; the other defendant (Capet) was jointly liable with Butcher for the several premiums, but the plaintiffs were at that time ignorant of the fact. Butcher in Trinity term in that year pleaded the general issue in that cause,

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and paid £5 15s., the amount of the premiums in respect of the Fame and of the Saint Lawrence, into court, under a rule for that purpose, which was drawn up in the usual form on the 1st of June, 1827: the costs of the plaintiffs in that action were taxed up to the time of paying money into court, and such costs amounted to £8 5s. 6d.; and the costs of the defendant Butcher, subsequent to the time of paying money into court, which accrued in consequence of the plaintiffs having taken some further proceedings in the action, were at the same time taxed, and amounted to £9 10s. On the 2d of June the plaintiffs received their taxed costs aforesaid, and paid to the defendant Butcher his taxed costs; but the money paid into court was not, though it might at any time afterwards have been, taken out of court by the plaintiffs. On the 3d of January, 1828, the plaintiffs' attorney gave notice to Butcher's attorney, who was also attorney for the present defendants, that he would not take the sum of £5 15s. out of court, but that he should take out a rule to discontinue the former action on payment of costs: This was done, and Butcher's costs up to the time of the payment into Court were taxed, and paid by the plaintiff.

[334] The "Indemnity Mutual Marine Insurance Company" knew, soon after the bankruptcy of Fulton, that the policies had been effected by him on behalf of the defendants, and proposed that they should pay the premiums remaining due to the company. The question for the opinion of this Court was, Whether the plaintiffs were entitled to recover the whole or any part of the sum of £621 10s.? If they were, the verdict was to stand for such sum as the Court should think right; if they were [*335] not, a nonsuit was to be entered. And it was agreed * that the Court should be at liberty to draw any conclusion from the facts stated in this case, which, in their opinion, the jury ought to have drawn.

R. V. Richards for the plaintiffs. — The plaintiffs are entitled to recover all the premiums which the bankrupt covenanted to pay. In ordinary cases the broker is entitled to recover the premiums from the assured, though he has not actually paid them. The underwriters cannot sue the assured, their remedy is against the broker only, *Airy v. Bland*, Mars. on Ins. 300; *Grove v. Dubois*, 1 T. R. 112; *Dalzell v. Mair*, 1 Camp. 532; *Edgar v. Fowler*, 3 East, 222 (7 R. R. 433); *De Gaminde v. Pigou*, 4 Taunt. 246.

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It is true that a policy in the ordinary form contains an acknowledgment by the underwriter that he has received the premium from the assured. The broker, however, is the agent of the assured and of the underwriter; of the assured in effecting the policy, and of the underwriter in receiving the premium from the assured. The broker, indeed, is supposed to have received the premium from the assured for the benefit of the underwriter; but the whole account, with respect to the premium after the insurance is effected, remains a distinct account between the *underwriter and the broker. Exclusive of fraud, there is [*336] an end of everything with respect to the premium between the insurer and insured, *Minett v. Forrester*, 4 Taunt. 541 (13 R. R. 676). Now if that be the law in ordinary cases, it must be so in this case. Here the contract is under seal, and the underwriters have taken a covenant from the broker to pay the premiums. They cannot, therefore, recover the premiums from the assured. Still the defendants, who have the benefit of the policy, must be liable to pay the premiums to some person. They are not liable to the underwriters, and, therefore, must be to the broker, who at their request pledged his credit with the underwriters to pay the premiums. The cases of *Mavor v. Simeon*, 3 Taunt. 497, and *Foy v. Bell*, 3 Taunt. 493 (12 R. R. 691), may perhaps be cited on the other side; but those cases only show that the insured are liable if there be anything like collusion between them and the broker, or bad faith on their part. The plaintiffs are at all events entitled to recover the £31 1s. which the broker who acted as the agent of the defendant would have been entitled to deduct from the premiums, by way of commission for effecting the policies. Here, by the regulations of the company, the defendants could not have insured with them. They induced the bankrupt to pledge his credit. They have paid nothing for the policies, though they have had the full benefit of them as if the premiums had been paid. [LITLEDAL, J. In the particulars of demand there is no claim for commission.] There is for insurance, and that includes commission. Besides, there is a claim for the whole premiums; and the £31 1s. is a sum which the underwriters would have allowed the broker to deduct from the premiums. . . .

* Brodrick, *contra*. — The plaintiffs cannot recover the [*337]

premiums as money paid, because no money has in fact been paid by the bankrupt to the use of the defendants. *Taylor v. Higgins*, 3 East, 169, and *Maxwell v. Jameson*, 2 B. & Ald. 51. It is undoubtedly true that in cases of insurance by policies in the ordinary form, the underwriter gives credit to the broker for the premiums, and can resort to him only for payment, and he, and not the underwriter, can recover the premiums from the assured. But the reason of that is, that the underwriter in a policy in the ordinary form, made between him and the assured, acknowledges the receipt of the premium, and is thereby estopped from saying that he has not received it. But when there is no such estoppel, the premium is due from the assured to the underwriter, and may be recovered by him from the assured. Here it appears upon the face of the policy that the premium has not been paid to the underwriter. There being no estoppel, therefore, in this case, the underwriter may recover the premium from the assured. The latter would have no defence to an action brought by the underwriter for the premium. [PARKE, J. — There is no express contract by the assured to pay the premium to the underwriter, and the law will not imply a contract by the assured where there [* 338] is an express one under seal by the broker. The *insurance is made in consideration of a covenant to pay, not of money actually paid.] If a broker take credit in account with an underwriter for a loss upon a policy, and the name of the latter be erased from the policy, the money in the hands of the broker is money had and received to the use of the assured. *Andrew v. Robinson*, 3 Camp. 199 (13 R. R. 788). Here the broker, as agent, effected the policy for the underwriters, and did not disclose the name of his principals. The underwriters, as soon as they discovered the principals, were entitled to sue them for the premiums.

Then as to the £31 1s., the right of the plaintiffs to recover is confined by the particulars of their demand to premiums. The broker might have been entitled, as between him and the underwriters, to deduct the sum of £31 1s. from the premiums, but it was not a sum to be paid by the defendants, and the plaintiffs cannot recover it as a compensation for a benefit conferred on the defendants. [PARKE, J. — Here the broker effects the policy either as owner or as agent. He is liable for the premium on his covenant to the two directors of the company. He has, therefore,

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effected a policy for the defendants as valuable as if they had actually paid the premium; is he not, therefore, entitled to recover for such services?] He may, undoubtedly, but not in this action. He cannot recover the commission as a compensation for a benefit conferred on the defendants, nor can he recover the premiums under the count for money paid. . . .

BAYLEY, J.—It seems to me that the plaintiffs are [339] entitled to the judgment of the Court for the whole sum. This is an action by the assignees of an insurance broker for work and labour, and premiums, against the defendants, who are ship-owners, and had employed the broker to effect certain policies on their behalf, which he did effect with a company of which he was a member. Now, according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. * But as [* 340] between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and to pay it to the underwriters. In this case the policies were not in the ordinary form but by deed, and the broker covenanted to pay the premiums to the underwriters; and in consideration of that covenant the policies were effected. The underwriters, therefore, took a covenant from the broker to pay the premium, instead of acknowledging the receipt of the premium as they do in the ordinary case of a policy by simple contract. In such a case the action would be maintainable at the suit of the broker, on the principle that he was entitled to call upon the assured for the payment of those premiums which he had become liable to pay to the underwriters, and which they had acknowledged the receipt of. The assured have had the benefit of the policies; and if the underwriters were liable upon the risk, they were warranted in calling upon the broker to pay the premiums. In point of justice, the assured ought to pay the broker, or in the event, which has happened, of his failure, his assignees. In an ordinary case the assurers would have no claim upon the assured for the premium, because by the policy they

acknowledge the receipt of it. Here there is no such acknowledgment, and therefore it may be said the assurers may claim the premiums from the assured. A contract cannot be raised by implication of law except in the absence of an express contract. [* 341] Now * here there was an express contract between the underwriters and the assured through the agent, and by that contract the underwriter agreed to look to the broker alone for the premiums. The assured have had the same benefit from the policies as if the premiums had been advanced to the underwriters at the moment when the policies were effected. Then it is necessary to consider in what situation the broker stands, in order to ascertain whether he is not entitled to call upon the assured for the premiums. The underwriters have a claim upon him for the full amount of premiums, and if that be so, he ought to recover those premiums from those persons who have had the benefit of the policies. But a difficulty arises in this case from the peculiar form of the declaration, and the particulars of the plaintiffs' demand. It seems to me that the premiums cannot be recovered as money paid to the defendants' use, because the bankrupt has not actually paid any money; but when we look at the form of the declaration, and leave out parts which may be fairly omitted, I think the plaintiffs may recover the full amount of their present demand; and I am of opinion that they are entitled to recover £31 1s., which may be considered as a compensation for the work and labour of the broker in effecting the insurance.

It has been insisted that by the form of the particulars the plaintiffs are prevented from recovering for work and labour; but I think that is not so. The plaintiffs, by their particulars, claim to recover for insurance. Now that term includes in it the compensation he is entitled to for his trouble in effecting the policies. I

entertain no doubt, therefore, that he is entitled to recover [* 342] upon the count for work and labour the sum of * £31 1s.

The only other question is, upon what count the plaintiffs are entitled to recover the residue of their demand for the premiums which the bankrupt became liable to pay by the covenant. I think they are entitled to recover upon the latter part of the first count, where it is stated "that the defendants were indebted to Fulton for his care and diligence, and for divers premiums of insurance then due and payable from the defendants to him for and in respect of Fulton's having before then underwritten and

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subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance." I think the words, "having before then underwritten and subscribed," may be rejected. The plaintiffs were not bound to prove the entire count, it was sufficient if they proved any part of it; and, looking at the words I have mentioned, I think they fairly meet the present case, because the defendants are indebted to the bankrupt for policies by him caused to be underwritten in their behalf, if we are right upon the first proposition that they are indebted to him for the premiums. It seems to me that the plaintiffs are entitled to recover the full amount of their demand, not as for money paid, but part for work and labour, and the residue on that part of the first count, which charges that they were indebted to him in respect of his having caused and procured to be underwritten divers policies of insurance. [As to the question of satisfaction, the learned Judge considered that the payment into Court of the £5 15s. which was not taken out — the action having been put an end to in another way — was not a satisfaction.]

LITTLEDALE, J. — The first question in this case is, [343] Whether the plaintiffs are entitled to recover anything? They are clearly entitled to recover £31 1s. for compensation for insurance. The word "insurance" in the particulars of demand covers every possible claim which a broker * may [* 344] have in respect of effecting the policies. It means everything connected with insurance. There is no objection to the plaintiffs recovering on the ground of any defect in the particulars, and if that be so, I think they are entitled to recover £31 1s., that being the amount of the commission the underwriters would have allowed the broker to retain and deduct out of the premiums paid by him to them for underwriting the policies, and which commission, it may be supposed, the defendants had authorized him to take.

Then the next question is, Whether the plaintiffs were entitled to recover the residue of the demand? Even where the policy is in the common form, it may be difficult to say upon what principle the broker can recover the premiums as for money paid before he has actually paid them to the assurers. But it has been so decided. Here, however, the policies are in a special form. The broker has covenanted to pay the amount of the premiums to the underwriters. If he had actually paid those premiums, the assured

would be bound to repay them to him. Here they have not been paid. But by the usage the assured may be considered as having entered into an agreement to consider the premiums as having been paid by the broker to the underwriters, and therefore, it seems to me, that the plaintiffs would have been entitled to recover if there had been any special count adapted to the circumstances of this case, stating a request to the broker to enter into a covenant to pay the premiums, that he entered into such covenant, and that the defendants thereby became liable. The difficulty I have in this case arises from the peculiar form of the count. It states [* 345] that the defendants were indebted to Fulton before * he became bankrupt for the work and labour of the said T. Fulton by him performed, in the writing, drawing, and making out of divers policies of insurance. Now it is clear that he is not entitled to recover for the premiums payable to the underwriters under that part of the count. The count then goes on, "and for divers sums of money before that time advanced and paid by Fulton for the defendants to divers persons, as and for premiums for underwriting and subscribing the said policies." Now here the premiums were not paid, and therefore the plaintiffs cannot recover upon those words of the count. Then comes the part of the count upon which it is said they are entitled to recover, "and for divers premiums of insurance and sums of money before that time and then due and payable from the defendants to Fulton for and in respect of Fulton's having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the defendants at their like special instance and request." Now Fulton did not underwrite any policies for the defendants. The words "divers premiums" seem to me to apply to the word "underwritten," because the premiums are a debt due from the assured. But it is said that there is a debt due to Fulton in respect of his having caused policies to be underwritten; but that is not a direct debt due to Fulton, but it is a claim arising in respect of Fulton's having pledged his responsibility by covenant. It rather seems to me, therefore, that there should have been a special count framed for the purpose of meeting this particular case. The effect of this objection, if it ought to prevail, would only be to subject the defendants to another action, for I entertain no doubt whatever upon the first point. . . .

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PARKE, J. — I think the plaintiffs are entitled to recover [346] the full amount of their claim, but not on the count for money paid, for that count cannot be maintained without proving actual payment, or that which is equivalent to payment. *Maxwell v. Jameson*, 2 B. & Ald. 51; *Taylor v. Higgins*, 3 East, 169. The giving of a security to pay is not equivalent to * actual payment. In ordinary cases of insurance, such a [* 347] form of action (if it can be supported) must be supported on the ground that the insurance is for a present premium paid down by the broker to the underwriter. By the course of dealing, the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, and he, as the agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured. The fact of giving credit in account by the broker to the underwriter, and the underwriter by the terms of the policy having acknowledged the receipt of the premium, are equivalent to actual payment. Here the policy was not effected for a present premium, and there was no credit in account given by the broker to the underwriter for the premium. The insurance was of a peculiar nature. The underwriter effected the policy in consideration of a special covenant by the broker to pay that premium, and the broker did not give credit for it to the underwriter in an account with him. There has not been any actual payment of it, nor anything which is equivalent to payment. The plaintiffs, therefore, cannot recover the premium as money paid to the use of the defendants. But they are entitled to recover compensation for the beneficial services rendered by the broker to the defendants; and I think they are not precluded from recovering such compensation in this action by the form of their particulars of demand. It seems to me also that they may recover the whole of their demand as “money due for premiums for policies caused and procured * to be effected by the bank- [* 348] rupt.” He undoubtedly did procure to be underwritten for them policies in this particular form; and the defendants have had the benefit of them, and they have been as beneficial to the defendants as if the premiums had been actually paid by the bankrupt to the underwriters; for the company cannot have any

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recourse to the defendants for the premiums, and in consequence the defendants are liable to pay a sum of money to the plaintiffs. A special count, stating the facts out of which the legal liability of the defendants arose, would be in substance an indebitatus count for policies caused to be effected by the broker at the request of the defendants, expanding the terms of it, and describing the special nature of the policies effected for the defendants upon the credit of the broker. I think, therefore, the plaintiffs are entitled to recover under this particular form of declaration.

Judgment for the plaintiffs.

ENGLISH NOTES.

The course of dealing, as described by PARKE, J. (p. 417, *supra*), is cited by BLACKBURN, J., in his judgment in *Xenos v. Wickham*, No. 18, p. 428, *post*.

As to the course of dealing between the broker and the underwriter for settling losses by credits in account according to the practice at Lloyd's, see notes to Nos. 17, 18, and 19, p. 464, *post*.

The rule based upon the custom as above described is not rendered inapplicable by the fact that the policy contains an express promise by the assured to pay the premiums to the underwriter. *Universe Ins. Co. of Milan v. Merchants' Mar. Ins. Co.* (C. A. 1897), 1897, 2 Q. B. 93, 66 L. J. Q. B. 564.

AMERICAN NOTES.

An insurance broker is not liable to the insurer for premiums paid unless by custom or where he acts under a *del credere* commission. *Touro v. Cassin*, 1 Nott & McCord (So. Car.), 173; 9 Am. Dec. 680.

Where it was the insurer's custom to charge the premiums to the broker, this operates to make the policy binding. *Train v. Holland P. Ins. Co.*, 62 New York, 598; *White v. Conn. F. Ins. Co.*, 120 Massachusetts, 330; *Stebbins v. Lancashire Ins. Co.*, 60 New Hampshire, 65.

Parsons quotes from the principal case (1 Marine Insurance, p. 503, note 4), and remarks: "But in this country there can be no question but that the underwriter can look to the assured in the first instance." The actual owner is bound to pay the premium even if the broker's note is taken for it, unless the insurer knew that the broker was not acting for himself. *Insurance Co. v. Smith*, 3 Wharton (Penn.), 520, distinguishing the English practice. In that case he can look only to the broker. *Patapsco Ins. Co. v. Smith*, 6 Harris & Johnson (Maryland), 166; 14 Am. Dec. 268, citing *Patterson v. Gaudesequi*, 15 East, 62.

No. 17. — *Bousfield v. Creswell.* — Rule.

No. 17. — *BOUSFIELD v. CRÉSWELL.*

(1810.)

No. 18. — *XENOS v. WICKHAM.*

(EX. CH. 1863, H. L. 1867.)

No. 19. — *WILLIAMS, TORREY, & CO. v. KNIGHT*

(THE LORD OF THE ISLES).

(ADM. 1894.)

RULE.

IF the policy has been formally executed and delivered and has remained in the possession of the insurers to be handed to the insured or their broker when called for, there is no presumption that the execution was conditional, or the policy an escrow, so as to prevent its taking effect as a deed executed and delivered.

Where the assured leaves the policy in the hands of his broker, he clothes the broker with the apparent authority to act as his agent in all matters arising on the policy, as for instance to claim and receive returns of premium for short interest, or for the compliance with warranties, to adjust and settle losses, and to receive the amount of them in cash; or, if the assured is cognisant of (and presumably has assented to) the practice at Lloyd's, on credit.

The agent of the assured who keeps the policy in his hands, impliedly promises the assured to use due diligence in such matters, and particularly to collect the sums due from the underwriters in case of a loss happening. But in case of their refusing to pay he is not bound to sue the underwriters, provided that he promptly gives notice of the refusal and offers to hand over the policy to his principal.

Bousfield v. Creswell.

2 Camp. 545-547 (11 R. R. 794).

Insurance Agent. — Duty as to Settlement of Loss.

[545] If an insurance broker keeps a policy he has effected in his hands, he is bound to use reasonable diligence to procure the underwriters to settle and pay any loss that may happen upon it.

The defendant's testator was an insurance broker, and had effected a policy for the plaintiff where a total loss had happened. This was an action for his not having duly called upon certain of the underwriters, who have since become insolvent, to settle the loss and pay the sums insured by them.

It appeared that Whitfield had been employed as a broker to get the policy underwritten; but there was no evidence to show that he ought to have called upon the underwriters to settle and pay, except that the policy remained in his hands after the loss had happened.

LORD ELLENBOROUGH. — If an insurance broker keeps the policy in his hands, he shall be presumed to promise that he will collect the sums due from the underwriters upon a loss happening, in consideration of the commission he receives for effecting the insurance. Here the testator, if he chose to part with his lien, might have handed over the policy to the assured as soon as it was effected, and his responsibility would then have been at an end; but as he retained it, he was bound to use all reasonable diligence to bring the underwriters to a settlement of the loss, according to the usage of trade in this respect.

There was a verdict for the defendant upon the merits.

The Attorney-General, Marryat, and Gaselee for the plaintiff.

Park and Lawes for the defendant.

If an insurance broker living at a distance from his principal, upon a loss happening, gives him credit in account for the money due from the underwriters, he cannot a considerable time after make a demand upon him for the amount of the sums subscribed by several of the underwriters who have become insolvent without paying.

No. 17. — Bousfield v. Creswell, 2 Camp. 545.

Jameson and Another v. Swainstone, C. P. Sittings in M. T. 1809. Indebitatus assumpsit to recover a sum of £325 from the defendant, under the following circumstances: The plaintiffs were insurance brokers residing at Leith in Scotland, and had, by orders of the defendant, who lived at Liverpool, effected for him certain policies of assurance with different underwriters at Leith upon the defendant's ship, bound on a voyage from Liverpool to the Baltic. In the course of the voyage the ship was stranded in the Orkneys, and the plaintiffs advanced considerable sums of money in refitting the ship and preparing her for the remainder of the voyage. Afterwards, an average loss was adjusted of 68 per cent., and the plaintiffs, upon that adjustment, in the month of May 1806, transmitted an account from Leith to the defendant at Liverpool, debiting him with their advances, and giving him in return credit for the amount of the average loss due from the underwriters in Leith. The balance of the account so rendered, was in favour of the plaintiffs £170, which the defendant immediately paid. In the month of August following, which was the usual time, at Leith, of settling between the brokers and the underwriters, the plaintiffs called upon the underwriters for the amount of the average loss; some of them paid, others refused upon the ground of insolvency. The sum which was not received, amounted to £325, and was the subject of the present action. Different applications were made by the plaintiffs to the underwriters for payment, but without effect. Afterwards, in August, 1808, the plaintiffs transmitted another account to the defendant, in which they claimed to be due to themselves this sum of £325, by reason of their not being able to receive it from the underwriters.

The plaintiffs' counsel contended, that as they had received no *del credere* commission from the defendant to guarantee the solvency of the underwriters, and as they had endeavoured to collect what was due from them, they had a right to recover from the defendant that sum for which they had before given him credit, upon the faith that the underwriters would pay it.

On the other hand it was insisted, that the plaintiffs, having kept their principal in the dark for two years, with respect to the state of those underwriters who refused to settle the average loss, could not now call upon him for the sum in question: and the defendant undertook to prove that the usage of trade was against the demand.

MANSFIELD, CH. J., said that, without resorting to usage, which might be different at Leith and London, he was of opinion that after so great a lapse of time between the rendering of the two accounts, the brokers, as betwixt themselves and their principal, must be presumed either to have received actual payment of the average loss from all the underwriters, or to have settled with them in account some way or other. For the purpose of recovering from the defendant, they should have apprized him in August 1806, of the state of the underwriters, who, he was naturally led to suppose, had settled with the brokers, and their silence had deprived him for the space of two years of all opportunity of enforcing the policies of assurance. The broker's laches was an answer to their demand against their principal, and they must look to the underwriters, whom they had trusted. — Verdict for the defendant.

Vide *Edgar v. Bumpstead*, 1 Camp. 411 (10 R. R. 713).

Xenos v. Wickham.

33 L. J. C. P. 13–25; 36 L. J. C. P. 313–326 (s. c. 14 C. B. (N. S.) 452; L. R. 2 H. L. 296).

[313] *Policy of Insurance. — Execution and Delivery of Deed. — Insurance Agents.*

The plaintiffs' broker, by their directions, agreed with the defendants (a marine insurance company) for the insurance of the plaintiffs' ship on certain terms; a policy of insurance under seal, &c., was duly executed in the absence of the broker; and according to the usual practice the deed was retained in the company's office to await the broker's application for it, and the broker debited with the premium; when the premium became payable according to the debiting and was demanded, the broker (who had charged to and been paid by the plaintiffs the amount thereof) declared that the insurance was a mistake, and without the plaintiff's authority had the deed cancelled. The plaintiffs brought an action on the deed: *Held*, reversing the decision of the Court of Exchequer Chamber, that, although retained in the defendants' office, under the above circumstances the deed was fully perfected and constituted a complete contract of insurance between the parties, and, as the broker had no authority to cancel it, the action was maintainable.

This was a proceeding in error, from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Common Pleas upon a special case. The facts of the case are set out with great particularity in the judgment of the LORD CHANCELLOR, and

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in the judgment of Mr. Justice BLACKBURN, delivered in the Court below (33 L. J. C. P. 15). It will be sufficient here to state that one Lascaridi, the insurance broker of the plaintiffs, by their direction, applied to the Victoria Insurance Company to insure a vessel of the plaintiffs, the *Leonidas*, for a year. The agent of the company initialed the ship for £1000, on certain terms. The company debited Lascaridi with the amount of the premium, and the plaintiffs paid Lascaridi that amount. The policy was afterwards, in accordance with the terms agreed upon, filled up by the company, at their office, in the absence of Lascaridi and of the plaintiffs, and was signed, sealed, and attested to have been executed in the usual manner by two of the directors of the company; but it was retained in their office, according to the practice of marine insurance companies, until the assured or his broker should send for it. When the time came for paying the premium, the company debited Lascaridi for the amount, and sent him a debit note for the amount. The clerk of Lascaridi stated that no premium was due; the company then sent the policy to Lascaridi's clerk, who stated that it had been put forward in error, and requested that it might be cancelled. Thereupon, a memorandum of cancellation was indorsed on the policy by the company. Lascaridi was charged with the stamp, and nothing else, and the policy was handed to his clerk that he might get a return of the stamp-duty. The plaintiffs had never authorized Lascaridi to cancel the policy, nor did they know that he had done so. The ship afterwards being lost, the plaintiffs brought an action against the defendant on the policy. It is right to add that the plaintiffs had previously instructed Lascaridi to effect an insurance on the same vessel for a different amount, and with different risk, and that on that occasion the agent of the company had initialed a slip for a certain amount, but before the policy was prepared the plaintiffs, through Lascaridi, applied to the company "to be off" that insurance, and that slip was destroyed accordingly.

The special case found that in the case of insurance companies the slip is always prepared by the broker, and a policy is afterwards prepared and filled up from the slip, by the officers of the company, and the policy, when executed, is kept by the company until sent for by the assured or his broker. The special case also stated that the custom between insurance companies and brokers is for the company to give credit to the broker for the premium;

that is, all premiums for insurances effected during each month are payable on the 8th of the succeeding month; and the [* 314] course is *to make out, prior to the expiration of the credit, and send to the broker at the end of the month a debit note for the amount of the premiums due, less discount, &c. The case also stated that Lascaridi was accordingly debited in the books of the defendant's company, on the 1st of May, with £105, and £2 stamp.

The cause was tried, before ERLE, CH. J., in Hilary Term, 1862, when a verdict passed for the defendant (who was sued as the representative of the company), with liberty for the plaintiffs to set the same aside, on the ground that there was no cancellation of the policy binding on the parties.

The rule was argued in May, 1862, when the Court of Common Pleas gave judgment against the plaintiffs, on the ground that the company had a right to expect that Lascaridi was invested with full powers with respect to the preliminary contract and the policy founded thereon; and that, although on the execution and delivery of a form of deed or written contract, the right or thing granted passes to the grantee, still this is only on the assumption that the grantee will accept the benefit, and it is otherwise if he repudiates the delivery and disclaims the benefit; and on error brought to the Court of Exchequer Chamber this judgment was affirmed by the majority of the Judges (POLLOCK, C. B., BRAMWELL, B., CHANNELL, B., —diss. BLACKBURN, J., and MELLOR, J.): these two learned Judges dissenting on the ground that Lascaridi had only the authority of a broker to effect an insurance, and though, so long as the terms were unsettled or the policy not executed, he might have assented to an alteration of the terms or an abandonment of the negotiation, yet as soon as the policy was executed a right of action vested in the plaintiffs, who alone could thenceforth cancel or rescind; and that taking manual possession of the instrument by the plaintiff or his broker was not essential to its binding effect. It was admitted by all the Judges that if the policy was binding, Lascaridi had no authority to cancel it.

The dissentient judgment of BLACKBURN, J., was as follows:—

[33 L. J. C. P. 15] BLACKBURN, J. — In this case the question reserved at the trial; and argued in the Court of Common Pleas, and in this Court, has been, whether the policy

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in question was ever so executed as to be binding on the defendants' company; or if it had been executed, whether before action it had been cancelled, so as to be no longer binding on them. The Court of Common *Pleas have given judgment [*16] in favour of the defendant, discharging the rule to enter the verdict for the plaintiffs.

After an attentive consideration of that judgment, I am unable to concur in it. I think that the result in this case depends more on the view taken of the facts than on any question of law. I shall therefore begin by recapitulating what I conceive to be the facts as appearing on the case.

It appears that it was proved at the trial that Mr. Lascaridi was employed as an insurance-broker for the plaintiffs' company. There is no statement that he had any peculiar authority from the plaintiffs, and we must take it that his authority was neither more nor less than the usual authority given to one employed as a broker in the manner stated. The plaintiffs' company had authorized Mr. Lascaridi to obtain for them insurances to the extent of £5000 on the steamer *Leonidas*, between England and the Baltic, from the 25th of April to the end of the season, at £8 8s. per cent. Mr. Lascaridi, in the usual way, prepared a slip containing these terms, and it was initialed by different private underwriters for sums in the whole amounting to £3000, and by an authorized clerk of the defendants' company for £2000. This, as is well known, amounts to an agreement between the broker and the different underwriters who have initialed, that they shall bear the risks to the extent to which they have initialed the slip, and shall receive the premiums accordingly, and this agreement is perfectly binding in mercantile honour, and but for the operation of the stamp laws, would also be enforceable at law. Before, however, any policy was executed or any premium paid, the plaintiffs became desirous of cancelling this insurance, and, in lieu of it, of insuring on the steamer for £4000 for all seas, for a year from the 30th of April at £10 10s., and they instructed Mr. Lascaridi as their broker to do so. He applied to the defendants' company, who consented to the cancellation of the former slip, and initialed a new slip by which they agreed to insure £1000 on the steamer on this altered risk; some, at least, of the underwriters consented to a similar cancellation. It would rather seem from the documents set out in paragraph nine of the case that they did not

all do so, but this is not material; we have only to deal with the insurance for £1000 on the *Leonidas* for a year from the 1st of May, at £10 10s. per cent., to which the plaintiffs, through their broker, and the defendants agreed — finally and bindingly in honour, and (but for the stamp laws) at law, by initialing the slip (set out in paragraph nine of the case) on the 30th of April.

The course of business is that stated in the case. The broker, after the slip is initialed and the insurance agreed on, prepares a policy which he sends round to the different private underwriters, who sign it. But with regard to insurance companies (with each of whom there is always a separate policy, executed according to the mode which is binding on that particular company) the course is different. It is thus stated in paragraph 12: "In the case of insurance companies a separate slip is always prepared for each company by the brokers of the assured, and the policy is afterwards prepared and filled up by the officers of the company, and is kept by the company until sent for by the assured or his broker." Such being the general practice, in this particular case Mr. Lascaridi prepared a separate slip, which he left at the office of the defendants' company, as is stated in paragraph 10, "in order that a policy might, in the usual course, be made out from it by the defendants' company." That slip, as it is called, is set out in the case. It, apparently, is on a printed form supplied by the company to the broker, and filled up; so that it contains all the necessary particulars for the filling up of a printed policy of the company, so as to carry out the agreement already come to. It is not initialed or signed on behalf of the company, and is not, like the first slip, a memorandum of the terms on which the parties had agreed to insure, but a request-note or mandate from the broker to the company to make out and execute a policy according to the practice. It is dated the 30th of April. On that slip are the letters *c.*, signifying "cash account," an explanation of which is given in the case, and on which I shall have to make some comments; but, in the meantime, I proceed with the narrative of the events in the order in which they happened.

On the receipt of this slip the defendant's company, on [* 17] the 1st of May, debited Mr. * Lascaridi, in account, with the amount of the premiums, £105, and with the cost of

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the stamp of the policy, £2. It is stated in the case, paragraph 14, that "in the course of a few days afterwards, a policy, in the form usually adopted by the defendants' company was filled up from the last-mentioned slip, and dated the 1st of May. A facsimile of that policy accompanies the case, and is to be taken as part of it." On looking at the policy, I find that it concludes in the following form: "In witness whereof, and that the said company are content with this assurance for the sum of £1000, we, the undersigned directors of the said company for the London Branch (on behalf of the said company, in pursuance of the powers and directions contained in the deed of settlement of the said company) have hereunto set our hands and seals at London, this 1st day of May, A. D. 1861:" and, on the face of it, it seems that it purports to be signed and sealed by two gentlemen, John D. Croz and R. Sutherland, and it purports to be "signed, sealed and delivered in the presence of R. M. Scaife, Res. Sec.;" though the position of the name of this gentleman is such, that it is a little ambiguous whether he attests as a witness to the execution by the directors, or countersigns as secretary.

The policy, in this form, continued to lie in the office of the defendant's company. I think we must presume this was in accordance with what is stated in the case to be the practice, viz., that it was "kept by the company till sent for by the assured or his broker." In the meantime, on the 1st of May, the plaintiffs paid Mr. Lascaridi the amount of the premiums. Nothing whatever more was done until the 8th of June.

I have been thus particular in stating these facts and dates; because it seems to me that the first question to be determined is, whether, during the interval between the affixing of the seals and names of the two directors to the policy and the 8th of June, the plaintiffs really were insured. All parties evidently considered them as being so: the period during which the ship was to be covered was running on, the premiums were paid, and the plaintiffs thought their risk covered. Yet, according to the argument for the defendants, this was all a mistake. The company, if a loss occurs at any time whilst the policy is lying in their office, with their seal affixed, and ready to be given to the insured, but kept by them, according to the practice, till sent for by the assured or his broker, may (it is said, if dishonest enough) resist any attempt at law to make them pay, as the policy was not binding.

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As brokers, from their well-founded confidence in the insurance companies, probably often leave the policies for a considerable time at their offices — sometimes even till the risk is run off — it is a question of some importance whether the companies can, under such circumstances, resist a claim. I am perfectly well aware that no respectable company would try to do so; or that, if they attempted it, they never would do business again in London; and therefore it may be said to be of less importance. But I cannot think it satisfactory, when the rule of law is such as to baffle the intention of the parties; and the real bargain is only fulfilled when parties are too honest to take advantage of the iniquitous benefit given them by law. Such cases do arise under the statute law not uncommonly; but they rarely arise under the common law, and very rarely under the commercial law. This case, however, may be an exception; and I proceed to examine the question, whether the law is such that the defendants, if so minded, could successfully have resisted a claim made, say, on the 1st of June, for a loss happening some time in May. Now I think they could not, for the following reasons:—

On the 1st of May the plaintiffs paid their broker, Mr. Lascaridi, the premium on this policy, by accepting a bill at four months drawn by him on them for that premium and others; and on the same day the defendants debited Mr. Lascaridi with the amount of the premium, and the stamp on the policy, in the cash account, between them and Mr. Lascaridi. This was strictly in accordance with the usual practice, and the legal effect of this transaction is very accurately explained by Lord WENSLEYDALE (then PARKE, J.) in *Power v. Butcher*, 10 B. & C. 329; 5 M. & R. 327 (p. 417, *ante*). He there says, “By the course of dealing the broker has an account with the underwriter; in that account the broker gives

the underwriter credit for the premium when the policy is [* 18] effected, and he as the agent of both the assured and the underwriter is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assurer. The facts of giving credit in account by the broker to the underwriter, and the underwriter by the terms of the policy having acknowledged the receipt of the premium, are equivalent to actual payment.”

If the opinion of that very learned Judge required any confirm-

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ation, it would be furnished by the universal practice, by which premiums are recovered by the assured under the count for money had and received, without any reference to whether or not the year during which the broker generally has credit, has run out, so as to make them payable in cash by the broker to the underwriter.

We have it therefore that on the 1st of May, the plaintiffs had in legal effect paid the defendants the full premium for an insurance for a year on their ship. The defendants had also in the same manner received from the plaintiffs the value of the stamp on the policy, and they had received the request slip from the plaintiff's broker, which, according to the practice stated in the case, amounted to a mandate to them to fill up the policy, and keep it at their office until sent for by the assured or his broker; and by retaining this request note they accepted that employment. It would have been most dishonest, if the defendants after all this had not prepared any policy. They were not so dishonest. They did fill up on stamped paper a policy in exact conformity with the authority in the request slip. To this the directors affixed their hands and seals; and the policy thus executed was left at the office to be given to the assured or his broker when they should send for it. What more was there wanting to make this the complete deed of the two directors sealed and delivered to the use of the plaintiffs? It is admitted that when taken away by the assured, this would be a binding deed; but I confess I cannot see how the act of the company's clerk in handing it to the broker's clerk could make it the deed of the directors if it was not so before. If it were necessary that the delivery of a deed should be to the authorized agent of the party for whose use it is made, I have no difficulty in saying, that by handing over the slip according to the practice stated in the case the assured constituted the insurance company their mandataries, and therefore that their officers are the authorized agents of the assured for the purpose of taking the deed; but *Doe d. Garmons v. Knight*, 5 B. & C. 671 (29 R. R. 355), shows that it is not necessary that there should be any such agency. Some of the Judges in this Court, if I understand them correctly, think that, even if the underwriter was authorized and requested by the assured to draw up and execute the policy, and the underwriter did in consequence draw up and execute the policy accordingly, yet that the policy thus drawn up was in point of law not binding until the assured by some sub-

sequent act showed his assent to the policy thus drawn up and executed. In this opinion, with all my respect for those who entertain it, I cannot concur. I am aware of no authority or legal principle preventing one party to an agreement from entrusting the other with authority to carry out any part of it for their mutual benefit. Where the agreement is, that a formal instrument shall be framed containing promises, yet executory on both sides, there is great imprudence in trusting one side to draw up the formal instrument which is to be the record of the contract binding both; though even then I should think it rather an argument tending to the conclusion that no such authority was given in fact, than one tending to show it not operative in law. But in the present case, the assured had performed all that they were to do; they had paid the premiums, and the price of the stamp, and all that remained was that the underwriters should execute the policy. I can see no objection either in fact or law to trusting the underwriter to do this; I have argued this on principle, but I own I think it decided by *Doe d. Garmons v. Knight*. In that case the person in whose favour the mortgage was made did not know what kind of security his debtor was about to give him, but trusted to him to give what he could; yet the deeds secretly executed were held valid. Surely it cannot be said that the facts that the assured in this suit stipulated for a particular deed, and that the deed was not secret, make it more invalid.

[* 19] * It was asked in the course of the argument what would be the effect if the company were to fill up the policy erroneously; and the assured only discovered this on sending for the policy, it might be after the loss had occurred. As the slip sent to the company is not a memorandum of an agreement, but simply a request, it requires no stamp, and probably, without infringing the revenue laws, a case might be made for enforcing in equity a reformation of the policy, so as to make it conform to the terms contained in this mandate; but it is not necessary to consider this point, for the policy in the present case was filled up in strict conformity to the authority given.

The Court below came to the conclusion that the policy was never perfectly delivered. I think they probably took a different view of the facts from that which I have taken. At all events, I cannot agree with them in that result. I think that from the time when the two directors, in the presence of the attesting wit-

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ness, put their names and seals on the policy, and left it in the defendants' office to be kept till sent for by the assured, the policy was binding, as their deed, on them, and on the defendants' company as represented by them.

I do the defendants the justice to believe that they would not have resisted this action on the ground that the policy had never been binding on them, though their counsel felt themselves compelled to argue that it was not. They really resist the action on account of what happened about the 8th of June; a defence that, whether well grounded in law or not, is perfectly honourable, and I proceed to examine the effect of that. Here, as on the first point, I think the result really depends on a right appreciation of the facts. I must, therefore, again, at the risk of being long, proceed to point out what they are.

On the request note or slip sent to the defendants' company were the letters $\frac{c}{a}$, which signified that the premium was, by arrangement between the broker and the defendants, to be entered in the cash account kept between him and the defendants. The whole practice as to the broker's accounts was proved in *Beckwith v. Bullen*, 8 El. & B. 683; 27 L. J. Q. B. 162, and is thus stated in the report of that case (8 El. & B. p. 685): "The broker now keeps two accounts with underwriters, called the credit and the cash accounts. Till within a few years, only one account was kept, which was that now called the credit account. When the slip for any particular policy is signed, it is arranged between the broker and underwriter whether the premium is to go into the credit account or the cash account. In either case the broker becomes debtor to the underwriter for the premium at once; but the time and manner of payment are different in the two cases. If the premium goes into the credit account, it is not payable till the end of the year. If before the end of the year any claim arising on one of the policies in the credit account is adjusted by the broker and underwriter, the broker has credit in the account against the underwriter for the amount of the loss thus adjusted, if the account is good for that amount; and at the end of the year, and not till then, the balance on the account, and the balance only, is due in cash from the broker to the underwriter, under a discount of £12 per cent. If the premium, instead of going into the credit account, goes into the cash account, the custom is the same, except that the amount is settled, and the balance is due in

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cash at the end of the month instead of the end of the year, and the balance is paid under a smaller discount." To make this complete, it should have been added that the broker receives credit in the account for a commission or brokerage of £5 per cent. on the premiums, and that though the balance on the account is struck on the last day of the year in the one case, or of the month in the other, the cheque for the balance is not actually given for some days afterwards. This is, in effect, what is stated in the case; but I have thought it desirable to quote the more detailed explanation given in *Beckwith v. Bullen*, because it more distinctly shows that the account (whether the cash account or the credit account) is one between the broker and the underwriter, into which the premiums received from all the clients of the broker go, and the balance on which is due from the broker to the underwriter, and in no way from any individual assured, [*20] whose particular premium had gone into * that account.

This needs to be distinctly understood, for it seems to me that the judgment of the Court below, to some extent, proceeds on a misapprehension of the facts on this point.

Soon after the last day of May the defendants sent in to Mr. Lascaridi a debit note for the balance of the cash account for that month between him and them. It chanced that in that month there had been only this one transaction between them, and, consequently, that the account consisted of only one item; but the debit note was, as it ought regularly to have been, in form a note debiting the broker with the amount of his account in May, and not a note debiting him, as agent for the plaintiffs, with their premium, which, as between the plaintiffs and the defendants, had been paid on the 1st of May, as explained by PARKE, J., in *Power v. Butcher*.

On the presentation of the debit note Mr. Lascaridi's clerk (who we must assume acted for him and by his authority) denied that any premiums were due. A second messenger was sent down with the policy. In the judgment below it was said, "In due course, the policy was sent by the company to Mr. Lascaridi's office," but this, I think, is a misapprehension of the fact. The company did not send the policy down to the broker for any other object than to show it him as a voucher to satisfy him that their note delivered to him of the amount of his private debt due from him to them, was correct, and that there really had been a policy made, on

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which a premium had been paid by the plaintiffs, and was now due from the broker to the defendants. They did not send the policy to him as agent of the assured, nor was there any reason why they should then have sent it to him as agent of the assured.

What followed is stated in paragraphs 23 and 24. I cannot understand the statement in these paragraphs as meaning anything else than this, that Mr. Lascaridi's clerk (whom, as I said before, we must consider as representing him) stated to the company not that the policy had never been ordered or executed, or was not binding, but that it had been put forward in error. He did not repudiate it or deny that it was binding, but he requested the defendants, as liberal men of business, to do that which they were not bound to do, *viz.*, to cancel a contract which was binding, but which had been made under a misapprehension: and the facts, as stated in this case, seem to me to be, that the defendants consented to this, and on the 14th of June indorsed on the policy a form of cancellation proper to express this. I cannot, for the reasons I have already given, think that the policy remained then still unexecuted, and I cannot, therefore, agree with the Court below in thinking that Mr. Lascaridi, if he had had the fullest authority from the plaintiffs, under seal or otherwise, so as to make him in law their *alter ego*, could, at that time, by a disclaimer, have divested the execution of the deed, which had then, in my view of the matter, been already binding, and making the defendants liable to the risk, for more than a month. But I am also of opinion that if Mr. Lascaridi had had full power to disclaim on behalf of the plaintiffs, he did not, in point of fact, attempt to exercise any such power. What, in fact, he did, was to enter into a fresh contract, professedly on behalf of the plaintiffs, to cancel the policy, receiving back the premium. This contract, if binding on the plaintiffs, would form a good defence to this action. It is stated in paragraph 24 that Mr. Lascaridi was not, in fact, authorized to make such a fresh contract.

The question, therefore, and, as it seems to me, the only one left, is, whether Mr. Lascaridi was clothed by the plaintiffs with such apparent authority to cancel the policy, as to enable him to bind the plaintiffs to the defendants. If so, the plaintiffs must fail in this action, and must seek redress in an action against Mr. Lascaridi, for misconduct as their agent. If he had not such authority, the plaintiffs are entitled to succeed in this action,

and the defendants' remedy, if any, is by an action against Mr. Lascaridi, on the principle of *Collen v. Wright*, 7 El. & B. 301; 26 L. J. Q. B. 147 [2 R. C. 484], for warranting that he had the plaintiffs' authority to cancel when he had not. The Court below express an opinion that the defendants "had a right to suppose Lascaridi to be invested with full power from the beginning to the end of the transaction, both with respect to the pre-[* 21] liminary * transactions and the policy to be founded thereon." If the facts are as I have above stated that I think them, I cannot agree in this. A broker employed to negotiate a contract is, no doubt, the proper party to receive and communicate all propositions during the course of the negotiation, and, therefore, so long as the negotiation lasts, the other side are justified in supposing that he has authority to make or accept any propositions; and if, whilst it is still in negotiation, he cries off, the contract is at an end, or rather never is made; but so soon as the negotiation is concluded, and the contract made, all authority on that ground ceases. This, I apprehend, will be denied by no one; and I need not cite authorities for it. If, therefore, I am right in thinking that, in fact, the contract of insurance was complete, and the negotiation at an end, on or soon after the 1st of May, Mr. Lascaridi could not, on the 14th of June, have authority to cancel the policy, merely from his having been the broker who had originally negotiated it.

But in this case the policy was never taken by the plaintiffs from their broker, Mr. Lascaridi, and, consequently, he had all the authority of a broker permitted by the assured to retain the policy which he had procured.

Now I agree that by leaving the policy in the hands of his broker the assured clothes him with some authority. I think that by leaving the policy in the broker's hands, the assured clothes him with apparent authority to act as his agent in all matters arising on the policy, as, for instance, to claim and receive returns of all premiums for short interest, or for the compliance with warranties, to adjust and settle losses, and to receive the amount of them in cash, or, if the assured is cognizant of the practice of Lloyd's, in account. Perhaps it may be put as high as to say that he is clothed with authority to do all that is incidentally necessary for carrying out the contract entered in the policy thus left in his hands — see *Richardson v. Anderson*, 1 Camp. 43 n.

(10 R. R. 628 n.), and *Goodman v. Brooks*, 4 Cowp. 163. I do not wish to be understood as giving a decided opinion that he has so much authority, but there are at least grounds for so contending. But I am aware of no grounds for saying that, by leaving the policy in the hands of the broker, the assured gives him authority to cancel the contract altogether. An authority so extensive as that seems quite unnecessary; it is objectionable, as it would put the assured entirely at the mercy of his broker, and until the argument of this case I think I never heard it suggested that it exists. During the argument I asked if there was any decision or dictum in support of this position. None such was quoted by the defendant's counsel. I am aware of none, and I think I am warranted in saying that no such decision, or even dictum, exists; and, certainly, in the present case there is no evidence that such an authority is given by practice. Nor can I think that the fact that the plaintiff had, on the 29th of April, given Mr. Lascaridi written authority to cancel one assurance before the premium was paid or the policy executed, and procure another, clothed him with authority as their general agent to cancel any policy of theirs, after the premiums had been paid and the risk had been covered for six weeks. It seems to me that the position contended for by the defendants amounts, in effect, to this: that the broker is the person contracting with the underwriter, free to make what bargain he pleases as to the contract made between them, and that the assured has no rights in the matter. But so far is this from being the case, that unless the policy be made in the brokers' name (which in the present case it was not), the broker is a stranger to the contract, and cannot set up the loss on the policy by way of mutual credit, as an answer to the claim against him of the assignees of the underwriters for premiums, not even when the broker has a lien on the policy — see *Koster v. Eason*, 2 M. & S. 112 (14 R. R. 603), and *Lee v. Bullen*, 8 E. & B. 692 n.; 27 L. J. Q. B. 161. The leave reserved at the trial was to enter a verdict for the plaintiffs, if on the facts proved "the policy was binding upon the defendant's company, and had been cancelled without authority."

For the reasons I have given I think the plaintiff has made out both propositions, and, consequently, that the rule to enter the verdict for the plaintiffs ought to have *been made [* 22] absolute, and I am therefore of opinion that the judgment should be reversed.

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[36 L. J. C. P. 315] The case having been argued, the LORD CHANCELLOR proposed the following question to the Judges:—

Whether, on the facts stated in the special case, the Victoria Fire and Marine Insurance Company were, when the ship *Leonidas* was lost, liable as insurers to the plaintiffs on the policy or alleged policy in the pleadings mentioned? It is to be assumed that the ship *Leonidas* was totally lost on the 1st of September, 1861.

MONTAGUE SMITH, J. — I answer the question of your Lordships in the negative, on the ground that there never was, as it seems to me, a complete and available contract of insurance.

I assume it to be clear that the slip does not create a valid contract of insurance, and that it is only of avail as a proposal, or an order for a complete contract or policy of insurance. I apprehend it to be equally clear that the contract is not complete until the policy is executed, and delivered to and accepted by the assured, or some agent for him. This policy, although executed, was not, in fact, delivered out of the office of the respondents, either to the assured or to his broker, Lascaridi, who had ordered it; and whilst it lay in the office the intended insurance was by the broker put an end to, on the ground that it had been put forward in mistake. I assume, in favour of the appellants, that if the contract of insurance had been complete, Lascaridi had no authority to rescind the contract; but I assume also, in favour of the respondents, that whilst it was incomplete, Lascaridi had authority to intercept its completion.

The whole case, therefore, is reduced to the question, which is mainly one of fact, whether, after the policy was executed, and before it came to the hands of the assured or his broker, the contract was perfected.

The appellants' case on this cardinal point wholly rests on the assumption that Lascaridi had made the officers of the company his agents to accept the delivery of the policy on his behalf. I think this is an assumption which is not warranted by the facts of the case. It arises from the very nature of the transaction that the person intending to insure, or his broker (when he acts through a broker), has a right to see the terms of the policy, and to object to them, if he thinks fit. This right may of course be delegated by the person intending to insure, and I will assume by his broker also; but it seems to me that clear evidence

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of such delegation is necessary, * and the person intending [* 316] to insure cannot, I think, with reason, be presumed to have delegated it to the insurers, from the fact that the policy was left in the office of the company, and not sent for; and yet such a presumption must be made if the argument for the appellants is to prevail. The right to object to the terms of the instrument, which may obviously be of the utmost importance, would, if this presumption is made, be gone as soon as the directors have executed the policy and handed it to their own clerks.

In the result I think that the assumption on which the appellants' case rests is not warranted by the evidence, and I confess it seems to me that consequences full of real danger to the interests of persons intending to insure would follow from a rule founded on such an assumption. I agree with my learned Brothers, who think that it is better to adhere to plain inferences of fact than to attempt to remedy the inconveniences of a negligent mode of doing business by making the facts bend to the exigencies of the negligence.

PIGOTT, B. — I answer to your Lordships' question, that in my opinion they were so liable.

The facts are very fully and accurately set forth in the judgment delivered by Mr. Justice BLACKBURN, in which judgment I entirely agree. It is unnecessary for me to do more than refer to the more prominent ones in stating the grounds of my opinion.

That opinion is based upon two considerations. First, I think there was a perfect and binding contract of insurance between the parties, dated on May 1st; and, secondly, that it was never cancelled or made void as between the plaintiffs and the defendant.

The whole difference between the parties has obviously arisen from the fraudulent conduct of Lascaridi, the plaintiffs' broker; but it is equally clear, I think, that the plaintiffs are not to be held responsible for nor ought their rights to be affected by it. The authority with which Lascaridi was invested by the plaintiffs was that of a broker employed to effect an insurance in the ordinary manner, with this additional circumstance only, that after he had bespoken the policy, and before it was filled up from the slip, he had express authority to procure an alteration in the terms of insurance. To that alteration the defendants acceded, and thereupon a second slip was initialed by them for the insurance in question (the former slip being destroyed).

The case states in paragraph 12 what is the course of proceeding where, as in this case, an insurance company are the insurers. It is, that "a separate slip is prepared by the broker of the assured, and the policy is afterwards prepared from it by the company, and is kept by them until sent for by the assured or his broker." A separate slip was in fact so prepared for this policy, and was left by Lascaridi at the defendants' office, in order that a policy might be made out in the usual course by the defendants. Then, with regard to the premiums, it is the custom for insurance companies to give credit to the brokers for them, and to debit them in account. This was done in the books of the defendants on the 1st of May, the day of signing the slip for this policy. On the same day Lascaridi sent to the plaintiffs (his principals) an account, in which he debited them with the premium and duty, and he also drew upon them at the same time for the amount. This draft was accepted by the plaintiffs, and was paid at maturity. When they accepted this bill they were told by Lascaridi that the policy would be ready in a day or two. In a few days afterwards a policy in the form usually adopted by the defendants' company was filled up from the last slip, and was duly executed by two directors of the company.

It bears date on the 1st of May; it purports to have been signed, sealed, and delivered in the presence of a witness; it was therefore in form complete. In that state it continued in the custody of the defendants until the 8th of June, when the defendants sent a debit note for the premium and stamp to Lascaridi's office. At the instance of Lascaridi, they were then induced to cancel the policy, on the representation that it had been "put forward in error." This was a false statement on the part of Lascaridi (as we now know). It is on the circumstance of the policy remaining in the hands of the defendants, as above stated, that the question depends, whether the transaction constituted a complete contract * in law and fact, or not. I am of opinion that it was complete.

What inference might have been drawn from the fact of its so remaining if there were no explanation about it, it is unnecessary to consider; for we have in paragraph 12 the reason given; and that reason is, not that it awaited anything to be done upon it by the defendants, or to be assented to by the plaintiffs, but that it was there only till sent for by the assured or his broker, or, in

other words, that it remained there according to the trade usage, or by a tacit understanding. This reason necessarily implies that in all other respects it was a completed transaction. But further, it is plain that the formal assent of the plaintiffs was not wanting to any of the terms of the policy, for that was evidently intended to be, and, accordingly, was made out in the defendants' usual form, filled up with the particulars from the slip. But further, the defendants acted upon the policy as a perfected transaction, when on the 8th of June they demanded payment of the premium for which they had given credit to the broker. In the face of this demand, I confess it seems startling that they can be heard to say that there was no complete contract subsisting at that period. It was in form complete, and was shown by the conduct of all the parties to it to be believed and intended by them all (apart from Lascaridi's fraud) to be completely in operation also.

It seems, therefore, to be reduced to this, viz., Was it essential that the deed should be given out of the defendants' possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense.

Sheppard, in his *Touchstone*, writing of the requisites of a good deed, treats, fifthly, of delivery as a matter of fact, to be tried by jurors (Vol. I., page 54, 7th edit.), and by the whole context shows that it is a question of intention. He says, at page 57, that "delivery is either actual, *i. e.*, by doing something and saying nothing, or else verbal, *i. e.*, by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and perfect deed."

Doe d. Garmons v. Knight is an authority most satisfactory on this subject, and it is only necessary to quote one passage from Mr. Justice BAYLEY's judgment. He says, "When an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, — nothing to show that he did not intend it to operate immediately, — it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential." This passage seems to be exactly applicable to the facts of the present case, with this addition, that there is here not only nothing to qualify the delivery, but, as above suggested, much to show that the defendants did intend it to be unqualified, and a deed in full operation.

The only remaining question which could arise, *viz.*, whether the plaintiffs were bound by the fraudulent conduct of Lascaridi in procuring the cancellation of the policy, was not much urged at your Lordships' bar, although it had been relied upon at Nisi Prius, and in the Court of Common Pleas. It is a proposition clearly not sustainable. The act was without authority, express or implied; and it is enough to say upon it that Lascaridi was the broker employed to procure a policy, and from that employment it is impossible to imply an authority to cancel it. Then he certainly had no express authority, as is admitted in the special case.

I, therefore, answer your Lordships' question in favour of the plaintiffs, and in the affirmative.

MELLOR, J. — I answer the question put by your Lordships to the Judges in the affirmative. I carefully attended to the arguments urged by the learned counsel who appeared for the parties in this case at the bar of your Lordships' House; but I confess that the observations then addressed to your Lordships did not affect the conclusion at which I arrived when the case was heard by the Judges in the Court of Exchequer Chamber. I do not venture to repeat the observations which I then made, but I humbly refer your Lordships to the judgment which was then read for me by my Brother BLACKBURN.

My judgment depends upon the facts which I consider to be admitted by the case, *viz.*, that the policy in question was [* 318] prepared * by the defendants in conformity with the instructions of the plaintiffs, given through their broker, Lascaridi; that by the mode of dealing between the plaintiffs' broker and the defendants, the amount of the premium and the stamp must, as against the defendants, be treated as paid; that the policy was duly executed and delivered as a deed by the defendants, who did everything that they intended to do to complete such execution and delivery, and that it was merely kept in their custody until called for by the assured or their broker. The plaintiffs, as I think, were bound by it, because it was prepared in conformity with their instructions. The defendants were bound by it, because they had accepted the terms and mode of payment of the premium and stamp, and acted upon the instructions of the plaintiffs, and done everything which they intended to do by way of execution and delivery of the policy as a deed, and retained it

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only for safe custody until sent for by the assured in the ordinary course of business.

BLACKBURN, J. — I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before the 8th of June was so executed as to bind the defendants' company to the plaintiffs; secondly, whether the transaction between the defendants' company and Lascaridi (the plaintiffs' broker) operated so as to release the company from the obligation they had contracted to the plaintiffs, supposing them to have done so.

I have already, in the judgment I delivered in the Court below, expressed the reasons for my opinion at length; and as I have not been induced by anything I have heard at your Lordships' bar to alter the opinion I then expressed, I think it better to refer your Lordships to that printed opinion than to repeat again the reasons I there gave.

I have had an opportunity of perusing the opinions of my Brothers WILLES and SMITH, and, if I understand them rightly, they agree with me in thinking that if the policy was binding before the 8th of June, what occurred subsequently would not discharge the company. I shall therefore say nothing more on that branch of the question.

As to the other branch, I would wish to call your Lordships' attention to what I think are the real points in controversy. They are, I think, two: one of fact, the other of law.

The question of fact is, I think, this: was the policy really, in fact, intended by both sides to be finally executed and binding from the time when the directors of the defendants' company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not?

If I thought that the parties did not, in fact, intend it to be then finally binding, I do not think there would be any magic in the law to make it binding, contrary to their intention; but I submit to your Lordships that the statements in the 12th paragraph of the case as to what is stated to be "always" the practice, and the statements in the 15th and 18th paragraphs as to what was done in this particular case, show that the intention of both parties was, that the policy, when drawn up by the company in conformity with the instructions in the advice slip sent in by the

broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that they meant that the policy from that time should be binding, and should lie in the company's office, as the property of the assured, till sent for by them, and then be handed over to their messenger.

It seems that some of the Judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts.

Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as bailees for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

I can on this part of the case do little more than state to your Lordships my opinion, that no particular technical form [* 319] * of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying, "I deliver this as my deed;" but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's Case*, 3 Co. Rep. 26, it is said: "If A. make an obligation to B., and deliver it to C., to the use of B., this is the deed of A. presently; but if C. offer to B., there B. may refuse it *in pais*, and thereby the obligation will lose its force." I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendants' company, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to them to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case*, by saying that C. must not be a servant

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of A., though of course that is very material in determining the question whether it was "delivered to C., to B.'s use," which I consider to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B. In the present case the assured could not have refused the deed *in pais*, for it was drawn up in strict pursuance of the authority given by them in the slip set out in the case; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it *in pais*.

No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

WILLES, J. — I answer the question in the negative, that upon the facts stated in the special case the Victoria Fire and Marine Insurance Company were not, when the ship *Leonidas* was lost, liable as insurers to the plaintiffs on the policy or alleged policy in the pleadings mentioned.

Assuming, as upon the statement it must be assumed, that the broker had no authority to revoke this policy if once completed so as to be the contract of and binding upon both parties, the question is, whether it ever was so completed?

In dealing with this question as a practical one, it must be borne in mind that albeit consent, not corporal possession, makes the contract, yet the plain duty of the broker is not merely to bespeak but to procure the policy, and to procure it upon his own credit. A loose way of business upon trust cannot abrogate any part of that duty, or make up for the consequence of neglecting it; and, indeed, taking the practice alleged to prevail as a whole, it is for the most part, viz., the insurances effected at Lloyd's, consistent with the duty of the broker to effect the policy in such a manner that his employer, or he on behalf of his employer, should have the policy.

In case of insurance at Lloyd's no difficulty can arise, for the broker sends round the policy, and procures the signatures. When the policy is effected with a company, therefore, if analogy is to

prevail, the broker ought to call for the policy. A careless, practice, not stated to have grown into a known usage of trade, may exist of not asking for the policy; but if this be so it is pure negligence. Nor can it be doubted that the employer in such case, equally as in that of insurance at Lloyd's, is entitled to have the policy in his broker's hands. Nor could the broker, in case of any damage arising for want of a policy, or of a proper policy, through his default in not asking for it or looking to see [* 320] that it was in order, resist an action such as was *brought by the employers in *Turpin v. Bilton*, 5 Man. & G. 455, 12 L. J. C. P. 167.

The statutes requiring contracts of marine insurance to be in writing and stamped (35 Geo. III., c. 63, s. 11; 54 Geo. III., c. 144, ss. 4, 5) annul contracts not so framed; consequently, a marine policy or contract for a marine policy to be valid must be in writing, which, by the assent of both parties, shall represent the contract between them. But for the decided cases, it might have been supposed that upon the slip being completed there was a contract on the part of the assurers to prepare and hand over a policy according to the slip, and that, although because of the statutes no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy. And causes have even been tried without objection upon the notion that the insurance is complete from the date of the slip.

But the law as settled by the decisions upon the construction of the statutes referred to is, that, as there can be no valid insurance or contract for an insurance unless by writing with the statutory requisites, the slip by itself has no binding force. Thus it has been held that, notwithstanding the slip, the proposed assurer, upon the one hand, can insist upon being off, and can retract his order, and refuse to accept the policy, — *Warwick v. Slade*, 3 Camp. 127 (13 R. R. 772), where the employer retracted the broker's authority after the slip was signed, though before the policy was completed; and, on the other hand, that the slip imposes no liability upon the proposed insurer, and there is no remedy against him until the policy is complete. *Parry v. The Great Ship Company*, 4 B. & S. 556, 33 L. J. Q. B. 41.

It follows that the slip, though complete, is no contract nor even part of a contract of insurance, but a mere proposal that a policy of insurance shall be entered into *in futuro*, and, in case

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of insurance with a company, a request that the policy shall be prepared at the office. Does it follow, that when a policy is prepared in alleged compliance with the request, it shall be, without more, the contract of both the parties? That cannot be the rule, because it must be open to the customer, or to his broker when the negotiation takes place through a broker, to object, and especially in the case of company policies, which do not always follow Lloyd's form, that the policy is wrong. In case of war or a dangerous voyage, or, indeed, any case with a special provision, disputes may easily arise. In this very case a question might have been raised upon the omission of the running-down clause, which has been so commonly added in the margin since *Devaux v. Salvador*, 4 Ad. & E. 420, 5 L. J. (N. S.) K. B. 134; see *Taylor v. Dewar*, 5 B. & S. 58, 33 L. J. Q. B. 141.

It is thus obvious that there must be power to object or refuse assent to the policy when prepared by the company; and inasmuch as such objection or refusal touches the question, policy or no policy, it lies within the scope of the broker's authority. He may give a bad reason for his refusal, as the broker in the principal case is said to have done; but the badness of the reason assigned cannot take away from the effect of the act done, which, according to the maxim, must depend upon the power he had to do it, not upon the soundness of the reason he gave for doing it.

By way of removing this difficulty various suggestions have been made in argument. One was that the case is analogous to a conveyance of property where assent is presumed until disclaimer. I am not aware, however, that this doctrine of presumed assent has ever been applied to the case of a mercantile contract, with something to be done on both sides, such as to insure upon terms which may or may not be correctly expressed, in consideration of being paid or allowed to debit in account a premium which may or may not be commensurate to the risk.

In the case of a simple benefit conferred, to be taken as it is or not at all, like a bond or a release, there might be room for such a presumption, though it is difficult even there to recognize a complete contract before assent. But the presumption is out of place as applied to a contract with mutual obligations, which must be matter of * bargain, and must be incom- [* 321] plete so long as either mind may dissent.

Indeed, the suggested analogy to conveyances of visible property, if it held good, would not help the plaintiff, but rather tend to illustrate the necessity of subsequent assent. Thus, if B. order of a watchmaker a watch of the same make and materials as that of A., with B.'s name upon it, and the watchmaker makes it accordingly, intending it for B., and puts B.'s name upon it, so that it is as much as it can be the very watch bargained for, yet without a new assent on B.'s part, it does not vest in him; the watchmaker cannot make B. take to it, nor B. compel its delivery. See the argument in *Atkinson v. Bell*, 8 B. & C. 277.

And in like manner as to a contract to be prepared *in futuro*, if goods are bought, to be paid for by the buyer's promissory note or cheque payable to the seller or order, and the goods are delivered and accepted, and the buyer makes the note or cheque, and leaves it with his servant, to be handed to the seller when he calls for it, that transaction is not enough to vest the note or cheque in the seller, and the buyer may, without more, retake the note or cheque from his servant, and put it into the fire.

It is clear, therefore, that the doctrine of presumed assent to a conveyance will not help, and that the mere previous request (even though binding as part of a contract), that a contract, which to be valid must be in writing, shall be prepared by one of the parties proposing to contract for the other, has not the effect of vesting a right in any contract in writing if and when so prepared, and much less can a previous colloquy not binding as part of a contract have that effect.

As another way of getting out of the difficulty, it was suggested to assume that the insurance company or servants of the company were made agents of the employer of the broker, for the purpose of assenting to the policy on his part. That would, however, be simply assuming the thing that is not, for the sake of shutting out an unpleasant consequence of the thing that is. To hold an auctioneer, or common broker, or other independent go-between, to be authorized to complete the contract for both buyer and seller, is but a necessary conclusion of fact from his being their common agent. To reason thus as to a clerk or servant of one of the parties employed by him for attending to his business in a dependent capacity involves a contradiction, and has no foundation of fact.

These sources of light thus failing, let the transaction itself be examined with attention. It has been observed that the slip

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amounts only to a proposal that a policy shall be prepared upon certain terms. Those terms, so far as they are to bind the insurer, commonly include some known uniform ones, as to which there can be no question, but also others applying to the particular transaction, sometimes obscurely worded, sometimes imperfectly understood, and as to which disputes may arise. This consideration alone keeps the policy *in fieri* until objection is waived. On the other hand, the terms, so far as they are to bind the insured, include, besides the implied warranties, payment of premium either in cash or by being credited in account.

If, then, the plaintiff had ordered the policy without the intervention of a broker, or obtaining credit for himself, he could not have insisted upon obtaining it without paying the company in cash. Had they offered him the policy, and he refused to pay for it, they might have treated the negotiation as at an end, and cancelled the proposed policy. Had the loss happened before he called for the policy and paid the premium, the same result would follow, though the office might not choose to take advantage of a short delay. So much for a cash transaction.

If the office agreed to insure against the plaintiff's promissory note at a month, like considerations would arise. Had the company in such case prepared the policy, and left it with their clerk, and the plaintiff had drawn the note and left it with his clerk, it is difficult to see why, without more, the policy should vest in the plaintiff, and not the note in the company, which, without more, it clearly would not.

In the principal case the company were content to take the broker's credit instead of cash; that is to say, instead of stipulating for cash down, they stipulated for the broker's allowing them to charge him in *account with the premium; [*322] and this the broker, refusing to take the policy, refused to allow them effectually to do, and so put the office in the same position as if they had stipulated for cash, and cash had not been paid.

Some confusion has arisen from an attempt to deal with this case as if it were that of an agent of a named principal, undoing, without authority, a contract which he had completely effected in pursuance of his authority. The case ought not to be so regarded. The broker was an agent to procure a policy in consideration of a payment to be made to him by his employer, with whom directly

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the office had nothing to do, he taking care that the policy was effected upon the given terms and upon his credit, the office looking to him for payment, and having no claim against his employer. Inasmuch, then, as the broker had to exercise a judgment upon the sufficiency of the policy, it was necessarily within the scope of his authority to reject that prepared as not being one or the one ordered. When he does so properly his employer gets the benefit; when he does so improperly his employer has his remedy by action against the broker. But the office which dealt with the broker only, and stipulated for his taking to and being debited for such a policy, must, upon his rejecting it and refusing to be debited in account with the premium thereupon, have an equal right to consider the negotiation at an end, and to cancel the proposed policy, as if cash had been stipulated for and refused.

The transaction cannot properly be split up into parts. It stands upon the same footing as if, upon one and the same occasion, the broker had ordered the policy at the office, and whilst he waited for it the seals had been affixed to a form of policy in another room, and before he received or assented to the policy he had said, "Stay! I made a mistake. I decline to take up the policy, and you must not charge me in account with the premium." Whereupon the form was cancelled.

No subsequent protest by the principal that his agent ought to have acted otherwise can avail him. His payment of the premium was not made to the office, but to his own ill-conducted broker, and his remedy must be against him. The office has not received and has refused the premium; and it was in no default, because it acted upon the refusal of the broker, to whom the whole business of effecting the policy was left.

The fallacy of the argument for the plaintiff consists in separating the preparation of the policy from the rejection of it by the broker and thus splitting up into several contracts, one of which is alleged to be authorized and the other not, what in reality, though distinct events in point of time, constituted together but one negotiation, which by reason of the misconduct of the plaintiff's agent was abortive.

The question is thus answered in the negative.

THE LORD CHANCELLOR. — The difference of opinion which has prevailed amongst the learned Judges in this case must necessarily diminish the confidence which I feel in the judgment I have

formed upon it, more especially as that judgment is not in accordance with the views of the majority of the Judges. The question is one more of fact than of law, and, therefore, in considering it, it will be necessary to refer to the facts contained in the special case.

The action was brought on a time-policy of insurance, which the plaintiffs alleged had been effected with the Victoria Fire and Marine Insurance Company (represented on the record by the defendant, the chairman of the company), for £1000, for twelve months, on the ship *Leonidas*, valued at £13,000.

In April, 1861, the plaintiffs employed an insurance broker of the name of Lascaridi to effect insurances upon the *Leonidas* for six months, to the amount of £5000. Lascaridi accordingly prepared a slip in the usual form, which was initialed in the customary manner by various underwriters, and by a clerk of the defendant's company, in their behalf. In the case of private underwriters at Lloyd's, it is customary to have only one slip, which is signed by the different underwriters for the amounts for which they are willing to undertake the insurance. In the case of insurance companies, a separate slip is always prepared for each company by the brokers of the assured; and the policy is afterwards prepared and filled up from the slip by the

* officers of the company, and is kept by the company [* 323] until sent for by the assured or his broker. Before any policy was made out on the slip left at the office of the defendants' company, Lascaridi received a direction from the plaintiffs, dated the 29th of April, 1861, to "cancel *Leonidas*' insurance, and insure the same for all the year and for all seas, £4000, valued £13,000."

Lascairdi, after receipt of this order, called at the office of the company, and told them he wished the insurance to be off, as he was going to reinsure the vessel for twelve months and for all seas. Accordingly, the slip left at the office was destroyed, and another slip was prepared by Lascaridi, which was signed by different underwriters, and initialed by the same clerk of the company who placed his initials to the cancelled slip. A separate slip was prepared by Lascaridi, and left with the company, in order that, in the usual course, the policy might be made out from it. Lascaridi, on the signature of the new slip, was debited in the books of the defendant's company, under date of the 1st of May,

1861, with £105, the amount of the premium, and £2, the amount of stamp duty.

The usage with respect to premiums upon insurances effected by brokers is clearly explained by Lord ELLENBOROUGH, in *Jenkins v. Power* (6 M. & S. 282), and by BAYLEY, J., in *Power v. Butcher*. The latter learned Judge says: "According to the ordinary course of trade between the assured, the broker and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle-man between the assured and the underwriter." On the 1st of May Lascaridi sent to the plaintiffs an account debiting them with the amount of premium and stamp duty payable on the insurance of the *Leonidas*, and drew upon the plaintiffs a bill for four months, which was accepted and paid at maturity. A policy in the form usually adopted by the defendants' company was filled up from the slip, and dated the 1st of May, 1861; a fac-simile of it forms part of the special case, and it appears to be in entire accordance with the slip.

About the 8th of June, 1861, a debit note for the premium was sent to Lascaridi's office, with a request for payment. On presenting this note at the office, a clerk there said that no premium was due; and upon a second application, the clerk said that the policy ought not to have gone forward. The same day a clerk of Lascaridi called at the office of the defendants' company, and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was accordingly indorsed upon the policy, and signed by two of the directors of the company and by the secretary, and the policy so cancelled was handed to Lascaridi, in order to enable him to obtain a return of the stamp duty. The *Leonidas* was lost on the 1st of September, 1861. On the following day a clerk of Lascaridi's called at the office of the defendants' company, and said the policy was cancelled by mistake, and wished it to be reinstated. The company, however, having heard of the loss of the vessel, declined to comply with the request, and the present action was therefore commenced. It was admitted by the defendants that the plain-

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tiffs never, at any time, in fact, authorized the cancellation of the policy, or were aware of it, nor did they ever receive back from Lascaridi any part of the premium, nor any credit for the same.

The questions which arise out of these facts are, first, whether there was a complete contract of insurance between the parties; and, secondly, if there were, whether it was afterwards cancelled by the plaintiffs' authority.

Upon the first question, we have no evidence of the fact of the execution of the policy, except that which arises upon the face of the instrument itself, and upon the fact stated in the special case, that the policy (which must be taken to mean the executed policy) is kept by the company until sent for by the assured or his broker. The policy purports to be signed, sealed, and delivered by two of the directors of the company, in the presence of Registrar Scaife, resident secretary. This statement, * on the face [* 324] of the policy, that all acts were done to render the execution complete, which is acknowledged by the directors who executed it, must, I think, be taken to be conclusive against the company, that it was not only signed and sealed, but also delivered. We all know the formal mode of executing a deed by the words "I deliver this as my act and deed;" a form which, no doubt, or something equivalent to it, was observed upon this occasion.

The policy, most probably, was afterwards given to the secretary, to be kept till called for. Now, although the policy was thus retained by the company, when formal execution of it took place, they held it for the plaintiffs, whose property it became from that moment. It is a mistake to suppose, as some of the learned Judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by Lascaridi. The usage of insurance companies to keep the policy until sent for by the assured or his broker, is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience. And as to Lascaridi's acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the plaintiffs to effect an insurance upon their vessel, upon certain terms dictated by them. He prepared the slip according to his directions. When the policy was executed in exact conformity to his instructions, his duty was so far discharged; and without the authority of the plaintiffs, he

could not refuse to accept it. They had effected, through their agent, a complete binding contract, which they alone could have a right to abandon.

It is hardly necessary, after the preceding observations, to say anything upon the second question as to the supposed cancellation of the policy. All the Judges seem to have thought that if the contract was binding, Lascaridi had no authority to cancel it. The company could not have been led, from anything in the previous transaction respecting the same vessel, to suppose that Lascaridi was authorized to act beyond the ordinary scope of the authority of a broker. It is one thing to cancel a slip, which is merely the inception of a contract, and to change the terms of the proposal for an insurance, and an entirely different one to release the underwriters from their liability upon a policy.

It is quite clear that Lascaridi had no authority from the plaintiffs to relinquish, on their behalf, the benefit of a contract to which they were entitled, and that the company had no reason to suppose that he possessed any such authority. I think that the judgment of the Exchequer Chamber was wrong and ought to be reversed, and that judgment should be entered for the plaintiffs.

LORD CRANWORTH.—My noble and learned friend has gone so fully into the facts of this case, that I shall not further advert to them, but shall assume that they are present to the minds of your Lordships.

There is one part of this case which seems to me to admit of no doubt. If the policy was so executed as to have become a complete instrument, binding on the respondents, and giving a good right of action to the appellants in the event of a loss, I think it clear that they could not cancel it at the instance of Lascaridi. They had a right to consider him as having authority to do all which a broker can do in discharge of his duty in effecting a policy, and they might safely settle with him in case of a loss, if that be the ordinary mercantile usage; but there is no suggestion that it is part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into. The only semblance of plausibility in support of such an argument was the fact that he had on a previous occasion had an authority expressly delegated to him by the appellants — not to cancel a policy, but to cancel a slip. They had originally proposed, through Lascaridi, to effect a policy on the *Leonidas* with the respondents, on terms

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materially differing from that ultimately acted on, and a slip had been signed and handed to the respondents for that purpose five days before the signing of the slip, on the 30th of April; but on that latter day, and before anything had been done, Lascaridi called on the respondents at the instance of the appellants, expressing their desire to substitute the terms of insurance ultimately acted upon for those originally * proposed. To [* 325] this the respondents agreed, and the slip dated the 30th of April, 1861, was accordingly prepared and left with the company, as the groundwork of the policy to be prepared by them. It was suggested that as the appellants had thus authorised Lascaridi to make this important change in the nature of the contract to be entered into, the company might reasonably suppose he had authority to sanction the cancellation of a policy already validly binding on the assurers. To this I cannot accede, as it is admitted that Lascaridi had not, in fact, any authority to cancel the policy of the 1st of May; if it was a binding instrument, his act cannot affect the appellants, unless it was done according to some ordinary course of business which would warrant it. I can see nothing whatever to warrant such an assumption. And, indeed, the point was not much insisted on. The point really argued was, that the circumstances are not such as to show that any absolute liability ever attached on the respondents. The policy, it is said, did not become a binding contract on the respondents until it had been taken from the office by the appellants or their broker, and been accepted by them as the terms by which they were to be bound.

There is no direct evidence as to what actually took place when the policy was, according to the practice, as stated in the language of the special case, filled up from the slip by the officers of the company; but as the policy purports to have been signed, sealed, and delivered by two directors of the company, in the presence of the registrar, in pursuance of the powers and directions contained in the deed of settlement of the company, the fair inference is that this was the course prescribed by the deed, and that that course had been duly followed. But as to the effect of what was so done, the parties differ. The appellants contend that by thus signing, sealing, and delivering the policy, the directors made it an instrument thenceforth binding on the company. On the other hand, the company (now respondents) contend that until the policy was taken away by the assured or their broker it did not become

binding on them. This latter view is that which has been taken by the great majority of the learned Judges; and it is therefore not without some hesitation that I have arrived at a different conclusion, and that I concur with the opinions of the small majority of the Judges who heard the case when it was argued at your Lordships' bar. I am of opinion that from the moment when the directors, acting, as I infer they did, in pursuance of the powers and duties conferred and imposed on them by the deed of settlement, executed the policy, it became absolutely binding on the company, and that it was not necessary, in order to give it binding efficacy, that it should be taken away by the appellant or his broker. I come to this conclusion on the following grounds. In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or until some condition has been performed; but when the time has arrived or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed; it is a mere escrow.

If, therefore, the directors who executed this policy delivered it only conditionally, *i. e.*, to take effect only when taken away by the appellants or their broker, then, as it was not so taken away, it never became operative. But I can discover nothing leading to the inference that there was any such condition attached to the delivery. The expression in the case that the policy is kept by the company until sent for by the assured or his broker, can only mean that this is the ordinary course of practice. But such a practice cannot, without more, have the effect of converting that which would otherwise be an absolute, into a conditional delivery — of converting delivery as a deed into delivery as an escrow. The practice referred to is at least as consistent with the hypothesis of delivery as a deed, as of delivery as an escrow.

A policy of this company can only be executed (as I [* 326] * presume) when a certain number of the directors and officers of the company are assembled; and this explains

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why it is executed in the absence of the party assured. The practice assumes previous consent on the part of the assured to the policy to be executed. It is not the practice that the assured should call for or examine the policy before he takes it away, but that he should send for it, evidently treating it as an instrument complete when it is taken away from the office. If, when it has been sent to him, he should discover that it is not conformable with the slip, his only remedy would be a remedy in equity, to get it corrected according to the real meaning of the parties.

I know of nothing intermediate between a deed and an escrow. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterwards acquires that character. The practice is that it should be kept by the company till sent for by the assured or his broker, not till the assured has had an opportunity of examining it so as to ascertain that it conforms with the slip. It can hardly be argued that, after the assured has sent for and obtained possession of it, the company is not bound by it, even if it is not in conformity with the slip. Suppose the liability of the company, according to the slip, was to endure for a year, but that by the policy it is restricted to six months: the assured, on receiving the policy and discovering the error, might well object, and insist on having a different policy; but yet, if a loss should happen within the six months, it surely cannot be doubted that the company would be liable on the policy actually executed; so, if a loss should occur while the policy remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be because it had been completely executed, though never seen and approved by the assured; and if executed, I am of opinion that it became complete when signed, sealed, and delivered. If the usage had been that it should, after being signed, sealed, and delivered, remain in the hands of the secretary until the assured or broker had done some act signifying his approbation of it, that might have raised a question whether, until that approbation had been expressed, it was more than an escrow. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterwards by some act of the assured. On these grounds, I have come to the

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conclusion, after much consideration, that the three learned Judges, who were the majority, giving their opinions to your Lordships were right, and so that judgment ought to be for the appellants.

Judgment reversed and judgment given for the plaintiffs.

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(THE LORD OF THE ISLES.)

1894, P. 342-349 (s. c. 64 L. J. P. D. & A. 15; 71 L. T. 92).

Insurance. — Indemnity. — Duty to sue on Policy. — Principal and Agent.

[342] The plaintiffs, barge owners, hired the defendant's tug on the terms of indemnifying the defendant against all loss, damage, expenses, or costs to which the defendant might be put by reason of collision or otherwise in connection with the tug, and the defendant undertook to keep the tug fully insured against all risks, including collision risk and damage to or by craft in tow of the tug or such craft colliding with others, and to indemnify the plaintiffs in respect of such damage to the extent of the moneys received by him under the insurance.

The defendant effected policies of insurance to cover the specified risks to the extent of £2000 on an admitted valuation of the tug of £2800.

A barge of the plaintiffs, whilst (it is alleged) in tow of the defendant's tug, came into collision with, and damaged, a steamer. The owners of the steamer sued the plaintiffs, who admitted liability, and, on the reference, the damages were assessed at £335 10s., which sum was increased to £458 19s. 7d. by interest, the costs of the reference, and the costs incurred by the plaintiffs in the proceedings against them.

The defendant sent in the plaintiffs' claim to the underwriters, and [343] on their refusal to pay, offered to hand over the policies to the plaintiffs; but the plaintiffs required the defendant to sue the underwriters, and in default, to pay the plaintiffs the above amount by way of damages for breach of contract. The defendant denied liability beyond the proportion of the claim for the damage on the uninsured value of the tug, and in respect of this liability paid £165 1s. into court.

Held, by BRUCE, J., that the defendant was entitled to judgment, as he had not broken his contract, and was not bound, without an indemnity, to take legal proceedings, at his own cost and risk, against the underwriters.

Action under a contract of indemnity, or, in the alternative, for damages for breach of contract. The plaintiffs were Williams, Torrey, and Field, Limited, owners of barges and other craft for transport purposes; the defendant was James Percy Knight, tug owner, carrying on business as the Kaiser Steamtug Company.

The substantial question raised was, whether the defendant, the owner and insurer of the tug *Kaiser*, was bound to sue the under-

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writers on their refusal to pay a loss sustained by the plaintiffs, as charterers of the tug, by reason of a collision by craft alleged to be in tow of the tug and a third vessel.

By an agreement in writing, dated June 10, 1892, the defendant let, and the plaintiffs hired, the defendant's screw steam-tug *Kaiser*, of the admitted value of £2800, at a weekly rent, for four weeks from June 8, 1892, and thence from week to week until determined by notice. The plaintiffs agreed to keep and maintain the tug in good repair (fair wear and tear and any flaw or defect in the machinery excepted), and in such good repair at the termination of the agreement deliver up to the defendant, and it was further provided that the plaintiffs should, during the continuance of the agreement, indemnify the defendant against penalties or forfeitures arising out of any breach of any of the provisions of any Act of Parliament or by-law affecting the tug, and also against any loss, damage, expenses, or costs the defendant might be put to by reason of collision salvage services or otherwise in connection with the tug, and the *defendant agreed to fully insure and keep the tug insured* against all risks, including collision risk and risk of damage to or by craft or vessels in tow of the tug, or such vessels or craft colliding with others, and the defendant undertook to furnish to the plaintiffs an abstract of the policy or policies effected, provided *always that if at any time [*344] during the continuance of the agreement the tug should be damaged by or should occasion damage to craft or vessels in tow of the tug, and the tug or any craft or vessel that she might be towing should be damaged by or should occasion damage to any craft or vessels or otherwise which should be covered by the insurance, then the *defendant would indemnify the plaintiffs in respect of all such damage to the extent of all moneys received by him under such insurance.*

The defendant effected policies on behalf of himself and all others interested, to cover the specified risks of £500, £450, and £1050, in all £2000, leaving £800, the balance of the agreed value of the tug, uninsured.

On June 26, whilst the defendant's tug was swinging round the barges of the plaintiffs, which she had in tow, above London Bridge, the tow-rope of one of the barges broke, and the barge came into collision with, and damaged, the steamship *Lord of the Isles*, lying at her moorings off the Old Swan Pier. The owners of the steam-

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ship commenced an action *in personam* against the present plaintiffs, and they, as defendants in that action, having admitted their liability, the damages were assessed by the registrar at £335 10s. This sum, with £1 5s. 9d. interest and £68 12s., the amount of the taxed costs payable to the owners of the *Lord of the Isles*, together with £53 11s. 10d., the plaintiffs' own costs in the action brought against them, made up a total of £458 19s. 7d.

The defendant, on receipt of this claim of the plaintiffs, sent it on to the underwriters, who refused to pay. Thereupon the defendant offered to hand over the policies to the plaintiffs, and give every assistance; but the plaintiffs insisted that the defendant was bound to collect the money from the underwriters, and, in default of payment, to sue them, or to pay the amount either under his alleged contract of indemnity, or by way of damages for breach of contract.

The defendant paid £165 1s. into Court, being the proportionate part of the claim for damage to the *Lord of the Isles* on the uninsured value of the tug, and denied further liability.

The action was tried on an agreed statement of facts, to [* 345] which * was appended the agreement as to the hire of the tug, the policies of insurance effected by the defendant, and the proceedings in the action by the owners of the *Lord of the Isles*.

Pyke, Q. C., and Hurst, for the plaintiffs. — As to the claim itself, apart from the question of the costs: If the defendant is to be assumed to have fulfilled the first part of the agreement, then, as the defendant undertook to indemnify the plaintiffs in respect of damage to the extent of moneys received under the insurance, the duty was cast upon him of collecting the money, and, on the underwriters making default in payment, he was bound to sue them on the policies effected by him in his own name, and to which the plaintiffs are not parties. If the defendant cannot recover all the money from the underwriters because he did not fully insure, then he has broken his contract, and is liable to make good the amount by way of damages for breach of contract. Secondly, as to the costs: These are recoverable from the defendant on the principle that they were not incurred in unreasonably defending the action brought by the owners of the *Lord of the Isles*, for the plaintiffs, to avoid expense, admitted their liability, and only incurred the costs in ascertaining the extent of that liability: see per POLLOCK, C. B.,

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in *Smith v. Howell*, 6 Ex. 730, at p. 736. The plaintiffs gave the defendant notice of the steps being taken, and the defendant did not prohibit the plaintiffs from putting the owners of the *Lord of the Isles* to proof of their claim. In such a case the costs are recoverable. *Blyth v. Smith*, 5 M. & Gr. 405.

Aspinall, Q. C., and Butler Aspinall, for the defendant. There is a difficulty in getting underwriters to insure a tug to the full amount against the specified risks; but as the defendant has admitted, by paying the amount into Court, that he is responsible to the extent the tug was uninsured, no question arises on that point. In respect of the residue of the claim, it is submitted that no liability attaches to the defendant, as he has fulfilled his obligations under the agreement by insuring and sending the plaintiffs' claim on to the underwriters. There is no contract by the defendant to indemnify, except to the extent of *moneys [* 346] received, and the agreement cannot be construed into an obligation on the part of the defendant to bring an action, at his own cost and risk, against underwriters, who allege, rightly or wrongly, that, as a matter of fact, the barge was not in tow of the tug at the time of the collision. The agreement constituted a demise of the tug, which thereby passed out of the control of the defendant, and through the negligence of the plaintiffs' servants the claim arose. For this negligence of their servants the plaintiffs admitted their liability in an action *in personam*, and went to a reference on that footing. The plaintiffs were *pro hac vice* owners of the tug. See the judgment of Sir JAMES HANNEN in *The Tasmania*, 13 P. D. 110, at p. 117, referring to *The Lemington*, 2 Asp. M. L. C. 475. At any rate, whether an action *in rem* would lie or not, the defendant was not liable at common law for the damage done by those in charge of the tug, who were not his servants, and the plaintiffs had an insurable interest entitling them to sue. Arnould on Marine Insurance, 6th ed., p. 61, citing the American case of *Oliver v. Greene*, 3 Mass. Rep. 133. It may be that the defendant has also an insurable interest; but the policies were taken out by the defendant for the purpose of protecting the plaintiffs against loss arising under their own contract to indemnify the defendant; and though the interests of the charterers and of the owners may be united in one policy, the underwriters, in any event, are only liable for the aggregate interest actually at risk. If the insurable interest of both parties is covered, the person

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whose interest is damaged by the act complained of is the person to sue, for the only question in these cases is, on whose behalf the policy is made. *Sutherland v. Pratt*, 11 M. & W. 296, 12 M. & W. 16.

As to the costs, the plaintiffs, at the reference, contested the claim for which they were personally liable, and did not act as reasonable and prudent men, unindemnified, would have acted. The plaintiffs cannot, therefore, make the defendant responsible. See the cases collected in *Chitty on Contracts*, 12th ed., p. 590.

L. E. Pyke, Q. C., in reply.

Cur. adv. vult.

[*347] *July 6. BRUCE, J. [After stating the nature of the action and the material facts already set out, the learned Judge proceeded:—]

The complaint made in this action is that the defendant has not endeavoured to collect, and has not received, any moneys under the insurances effected by him, and the plaintiffs contend that they are entitled to recover from the defendant the amount of £458 19s. 7d. The defendant, having failed to insure in respect of the balance of £800, part of the sum of £2800, the agreed value of the tug, admits that he is liable to pay to the plaintiffs a sum of money bearing the same proportion to their claim that £800 bears to the £2800, and he has brought into Court £165 1s. He contends that as to the residue of the claim he is not liable, because, having insured to the extent of £2000 in respect of the risks mentioned in the agreement, he has fulfilled his obligation as regards the insurance, and as his agreement to indemnify is limited to the extent of the moneys received by him under such insurance, and as he has received nothing under the insurance, he is under no obligation to indemnify.

The question in dispute resolves itself practically into this: Upon whom does the burden rest of compelling the underwriters to pay the amount of the loss insured by the defendant? The defendant agreed to insure, and I think it must be taken that the insurance was entered into to cover the plaintiffs' interest. It may be that the policy covered the defendant's interest also, and that, in the case of a total loss of the tug by perils of the sea, the defendant would, in certain events, be entitled to recover under the policy. But in the event which has happened, which has resulted in a loss to the plaintiffs, I do not doubt that the policy must be

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regarded as having been effected for the plaintiffs, and that any money recovered under the policy, in respect of the loss now in question, would enure for the benefit of the plaintiffs. It is contended that as the policy was effected by the defendant for the plaintiffs' benefit, he was their agent to effect the policy on their behalf, and it was, therefore, his duty to enforce the policy and to take proceedings against the underwriters to recover the money due under the policy. It appears from the defendant's letter of April 26, 1893, that he did apply to the underwriters to pay the * claim, and that they referred him to [*348] their solicitors; and by letter dated January 3, 1894, the defendant offered to hand over the policies to the plaintiffs; but the plaintiffs insist that the defendant must do more, and that he must, without any offer of an indemnity from them, at his own cost and risk, take legal proceedings against the underwriters.

I can find no authority in favour of this contention. No doubt where an agent effects a policy on behalf of a principal, and retains the policy with the consent of the principal, it becomes his duty to use reasonable diligence to enforce the rights and protect the interests of his principal in all matters arising out of the contract. By his negligence in the discharge of these duties the agent may render himself personally liable. *Bousfield v. Creswell*, 2 Camp. 545 (p. 420, *ante*). But where he does all that is necessary to preserve the rights of his principal, and demands the amount claimed on the policy from the underwriters, I think he does all that he can reasonably be expected to do. He is not bound to indemnify his principal against the trouble or expense of proving the justice of his claim. It is the principal who can alone, in most cases, furnish the proofs and documents by which the claim can be sustained. In the present case I understand that the underwriters deny that the barge that did the damage was at the time in tow of the tug. That is a fact which the underwriters are entitled to have proved. It is not reasonable that an agent should be exposed to the hazard and expense of a litigation to which he is a stranger. These are the rules which are laid down in *Duer on Insurance*, and in the absence of judicial decision I do not know of any higher authority. Even in the case of a *del credere* agent that learned author observes: ¹ "Where the liability of the principal debtor, as in the case

¹ Law and Practice of Marine Insurance, by John Duer, 1846, lect. xii., "Of the Extent of the Liability of the Agent," § 41.

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of the underwriter, is not absolute, but contingent; where it depends upon facts, the evidence of which it is the province and the duty of the assured to furnish, until that evidence has been given and has proved conclusive, it seems to be clear that the [* 349] del credere agent ought not to be held * responsible; for until then there is no certainty that a debt exists to which his guarantee was meant to apply."

In the present case the defendant did not guarantee the solvency of the underwriters, and it seems to me to be unreasonable to fix upon him a higher obligation than would attach to him if he had given such a guarantee.

These principles are, I think, in accordance with the general law. If an agent has, at the express or implied request of his principal, necessarily incurred expenses in carrying on litigation on behalf of his principal, these expenses must be borne by the principal, and the agent will be entitled to recover them from the principal: see *Howes v. Martin*, 1 Esp. 162; *Curtis v. Barclay*, 5 B. & C. 141; and I think it follows that the agent may, in cases where communication with the principal is possible, demand an indemnity before commencing litigation: *Lacey v. Hill*, L. R. 18 Eq. 182, 43 L. J. Ch. 551; see also, as to the liability of a trustee where there is a covenant to insure against fire, *Tudball v. Medlicott*, 36 W. R. 886.

For the reasons I have given, I have come to the conclusion that the defendant has not been guilty of any breach of his contract. It does not appear that he has not been ready and willing to do everything that he was bound to do to enable the plaintiffs to obtain the benefit of the policies effected on their behalf.

I have not thought it necessary to consider the question whether the action on the policy should be brought in the name of the plaintiffs or in that of the defendant, because it has not been shown that the defendant has been unwilling to allow the plaintiffs to use his name on a proper indemnity being given. See *Ex parte Kearsley*, 17 Q. B. D. 1, 55 L. J. Q. B. 325.

In the result I must give judgment for the defendant. The plaintiffs are, I think, entitled to costs up to the date of the payment into Court, and the defendant is entitled to the costs since that date.

ENGLISH NOTES.

An insurance policy against burglary, made in accordance with a proposal for insurance, and containing a proviso that no insurance should be held to be effected until the premium due thereon had been paid, was sealed with the seal of the insurance company, and signed by two directors and the secretary. The policy remained in the possession of the company. A loss having occurred before payment of the premium, the company disputed their liability to pay, — the premium not having been paid, although the insured was always ready to pay. It was held that there was a concluded agreement between the company and the insured; that the company had waived the condition as to payment of the premium, and that the insured was entitled to recover the amount of the insurance less the premium. *Roberts v. Security Co.* (C. A. 1896), 1897, 1 Q. B. 111, 66 L. J. Q. B. 119, 75 L. T. 531, 45 W. R. 214.

Where an insurance broker, under his general authority from the insured, effects a policy in his own name, he may — in case of a loss becoming payable upon the policy, and if he has, as against the insured, a lien upon the policy to the full value of the amount to be recovered — set off this amount against premiums due from him to the underwriter upon that and other policies. *Davies v. How* (1828), 4 Bing. 573, 29 R. R. 634.

As to the lien of the broker, there can be no question that he has a lien upon the policy for the premium and any expenses of effecting that policy. The following passage from Phillips on Insurance, s. 1909, has been cited with approval by Lord O'HAGAN in the House of Lords, in the case of *Fisher v. Smith* (H. L. 1879), 4 App. Cas. 1, 48 L. J. Q. B. 409, 416: "The agent who effects a policy for his principal, and advances the premium, or becomes responsible for it, and retains the policy in his hands, has a lien upon it for his commission and the premium until the same are paid to him, or he is supplied with funds for the payment, whether his immediate employer is the assured himself, or an intermediate agent; and in the latter case, whether the intermediate agency was known, or not known, to the sub-agent claiming the lien."

In *Fisher v. Smith*, the person effecting the insurance and claiming the lien was a sub-agent who knew his employer to be an agent, and it was held by the judgment of the Court of Appeal, which on that point was not appealed from, that the sub-agent had not a general lien in respect of his account with his immediate employer. But it appears to be well understood that where the broker is employed immediately by the insured he has a lien on each policy for the general balance of

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his insurance account. *Westwood v. Bell* (1815), 4 Camp. 349, 16 R. R. 800. In *Olive v. Smith* (1813), 5 Taunt. 56, 65, GIBBS, Ch. J., says: "I never remember any doubt to have existed in the profession whether a policy broker had a lien for his general balance on the insurance accounts." The circumstance that the decision in *Olive v. Smith*, as to mutual credit, was overruled by *Young v. Bank of Bengal* (1836), 1 Moore P. C. C. 150, and *Alsager v. Currie* (1844), 12 M. & W. 751, 13 L. J. Ex. 203, 204, does not detract from the authority of this dictum of GIBBS, Ch. J. See Arnould on Insurance, 6th ed., vol. 1, p. 212.

Where a merchant receives an order to effect a policy, and does so, having at the time of effecting the policy no notice that it is not made on account of the person from whom he receives the order, he has a lien on the policy for the general balance of his account with the merchant giving the order. *Mann v. Forrester* (1814), 4 Camp. 60, 15 R. R. 724. But the case is different where the merchant receiving the order has, at the time of executing it, notice that the interest insured is in another, for whom the merchant giving the order acted as agent. In that case the merchant effecting the policy has only a lien for the premium or other charges in connection with the insurance. *Mildred v. Maspons* (*Maspons v. Mildred*, H. L. 1883), 8 App. Cas. 874, 53 L. J. Q. B. 33, 32 W. R. 125.

The usage or practice at Lloyd's, referred to in the Rule, is that the insurance broker keeps a running account with the underwriters. "When a policy is adjusted" (as the practice is stated in evidence in *Bartlett v. Pentland* (1830), 10 B. & C. 760, 764), "payment is made at the expiration of a month, at which time the broker's account is credited with the amount of loss; and if the premiums due fall short of such amount, the balance is paid to the broker in cash. If, at the time of adjustment, the amount of premiums due from the broker to the underwriter exceeds the amount of the loss, it is usual for the underwriter to strike his name off the policy at that time; but the broker is not credited till the end of the month, it being considered that during the interval the assured may call for the money from the underwriter." The question whether the insured is bound by the usage for the agent to take payment in credit, has been the subject of many contested cases. The result of the decisions is that the usage is not a reasonable one so as to bind persons who have not agreed to be bound by it; and the question is whether the usage or practice in question was known to the person giving the order to the broker, the presumption being that if he knew of it he acquiesced and in effect agreed to be bound by it.

This usage at Lloyd's was given effect to in the case of *Stewart v. Aberdeen* (1838), 4 M. & W. 211, 7 L. J. Ex. 292. The plaintiff was

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a merchant in Liverpool, where the custom is well known, and the consequence is described by Lord ABINGER, C. B., as follows: "It must not be considered that by this decision the Court means to overrule any case deciding that where a principal employs an agent to receive money, and pays it over to him, the agent thereby requires any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the Court is of opinion that where an insurance broker, or other mercantile agent, has been employed to receive money for his principal, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, — the rule laid down in those cases cannot properly apply; but that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal."

In the following cases there was held to be no evidence that the insured was cognisant of, or had assented to, the usage; and consequently the broker was held not entitled to set off a loss by way of credit against the debit on his insurance account with the underwriter; and the striking out (according to the custom) of the underwriter's name upon the credit being allowed, being done without the authority of the insured, does not discharge the debt due from the underwriter to the insured. *Bartlett v. Pentland* (1830), 10 B. & C. 760; *Scott v. Irving* (1830), 1 B. & Ad. 605; *Sweeting v. Pearce* (Ex. Ch. 1861), 9 C. B. (N. S.) 534, 30 L. J. C. P. 109.

AMERICAN NOTES.

The case of *Xenos v. Wickham* is cited by May (1 Insurance, sect. 60), and by Biddle (1 Insurance, sect. 149), and by Beach (1 Insurance, sect. 511), and the doctrine of the first branch of the Rule finds support in many American cases, prominent among which is *New Eng. F. & M. Ins. Co. v. Robinson*, 25 Indiana, 536, where the company notified the insured that he had the policy and would hold it till called for, the premium to be paid in five days, and the company was held liable for loss within the five days. To the same effect: *Bragdon v. Appleton F. Ins. Co.*, 42 Maine, 259; *Sheldon v. Conn. M. L. Ins. Co.*, 25 Connecticut, 207; *Southern L. Ins. Co. v. Kempton*, 56 Georgia, 339; *Schwartz v. Germania L. Ins. Co.*, 18 Minnesota, 448; *Baldwin v. Chouteau Ins. Co.*, 56 Missouri, 151; *Hallock v. Com. Ins. Co.*, 2 Dutcher (N. J. Law), 268; 3 *ibid.*, 645; *Van Loan v. Farmers' M. F. Ins. Ass'n*, 90 New York, 280; *Supreme Lodge v. Grace*, 60 Texas, 569; *McLachlin v. Aetna Ins. Co.*, 4 Allen (New Brunswick), 173; *Eames v. Home Ins. Co.*, 94 United States, 621: "If

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parties could not be made secure until all the formal documents were executed and delivered, especially where the insuring company is situated in a different State, the beneficial effect of this benign contract of insurance would often be defeated and rendered unavailable. As said by Mr. Justice FIELD in the case of *The Insurance Company v. Colt*, 20 Wall. 567, 'It would be impracticable [for a company] to carry on its business in other cities and States, or at least the business would be attended with great embarrassment and inconvenience, if such preliminary arrangements required for their validity and efficacy the formalities essential to the executed contract. The law,' he continues, 'distinguishes between the preliminary contract to make insurance or issue a policy, and the executed contract or policy. And we are not aware that in any case, either by usage or the by-law of any company, or by any judicial decision, it has ever been held essential to the validity of these initial contracts that they should be attested by the officers and seal of the company. Any usage or decision to that effect would break up or greatly impair the business of insurance as transacted by agents of insurance companies.' (This reasoning is the basis of the familiar doctrine that an oral agreement to insure is valid and effectual before and without the issuing of any policy. *Ruggles v. Am. Cent. Ins. Co.*, 114 New York, 415; 11 Am. St. Rep. 674.) So in *Dibble v. North. Ass. Co.*, 70 Michigan, 1; 14 Am. St. Rep. 470, where an agent, with general authority from the owner to keep his property insured, canceled one policy on order of the company, and immediately reinsured, paying the premium and notifying the insured by mail, and depositing the policy in his safe for him, it was held that the second company was bound from that moment. The Court said: "While Marsh could not act as agent for both parties in making the contract of insurance, or upon any other matters relating to the business requiring the concurrence of both parties, he could act as the custodian of the policy which was issued for the plaintiff, until he should call for it. This was a matter in which the company had no interest whatever, and when the agent received it for the plaintiff for that purpose, it was clearly a delivery by the company."

But where the policy is delivered to the agent of the insured, and he does not accept it, but retains it subject to decision, it is not binding. *Millville M. & F. Ins. Co. v. Collierd*, 38 New Jersey Law, 480, citing *Xenos v. Wickham*.

In *Standard Oil Co. v. Triumph Ins. Co.*, 64 New York, 85, the case of *Xenos v. Wickham* was approved to the doctrine that the broker of the insured, with possession of the policy, "must be regarded as the plaintiff's agent . . . in procuring, modifying, or cancelling the policy in question, and his acts in respect to the policy are the same as if done by the plaintiff." Cited and approved in *Pottsville M. F. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Penn. State, 143.

A broker employed to effect insurance has no power to give or receive notice of cancellation; when he procures the insurance his agency ends. *Von Wein v. Scottish, &c. Ins. Co.*, 52 New York Superior, 490; *Grace v. Am. Cent. Ins. Co.*, 109 United States, 278; *Indiana Ins. Co. v. Hartwell*, 100 Indiana, 566; *East T. F. Ins. Co. v. Brown*, 82 Texas, 631. But in none of these did the broker retain the possession of the policy.

No. 20. — *Motteux v. London Assurance Co.*, 1 Atk. 545. — Rule.

SECTION III. — *Making of the Contract. The Slip.
Representation and Concealment.*

No. 20. — MOTTEUX *v.* LONDON ASSURANCE COMPANY.
(1739.)

No. 21. — IONIDES *v.* PACIFIC FIRE AND MARINE
INSURANCE COMPANY.
(1871.)

RULE.

THE slip is the instrument expressing the real terms of the agreement between the parties, and (after repeal of the former stamp laws by 30 Vict., c. 23) may be given in evidence for any purpose except for enforcing a contract not contained in a stamped policy.

Motteux v. London Assurance Company.

1 Atk. 545–548.

Marine Insurance. — Label (or Slip).

If a policy of insurance differs from the label, which is the memorandum or minutes of the agreement, it shall be made agreeable to the label.

The ship *Eyles*, as appears by the bill, late in the East India Company's service, was in 1732 at Bengal, at which time the owner employed Mr. James Halhead to insure this ship in the London insurance office for £500, the adventure thereon to commence from her arrival at Fort St. George, and thence to continue till the said ship, with her ordnance, apparel, &c., should arrive at London, and that it should be lawful for the said ship, in the said voyage, to stay at any port or places without prejudice, and that the ship was and should be rated at interest or no interest, without further account; in consideration whereof Halhead paid £15 premium, being at the rate of £3 per cent, which was the

current premium then, upon the ship at and from Fort St. George, and a label of such agreement was, the 7th of August, 1733, entered in a book, and subscribed by Halhead and two of the directors, and the policy should have been made pursuant thereto; but, upon looking into the policy, it appeared that by a mistake the policy was made out different from the label, and instead of the ship's being insured from the time she should arrive at Fort St. George as it ought to have been, according to the label, the insurance is made by the policy to commence only from the departure of the ship from Fort St. George to London; and therefore the company insisting that in regard the ship was lost in the river of Bengal, and not in her voyage from Fort St. George to London, the plaintiffs are not entitled to recover on the policy, and for this reason the plaintiffs have brought their bill against the defendants, the company, to be paid £500 with interest, having the usual abatements in case of loss.

[546] The *Eyles* came to Fort St. George in February, 1733, in her way to England; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ships, &c., she sailed for Bengal to be refitted, and after being sheathed, in her return upon her homeward-bound voyage she struck upon the Engilee sands, and was lost. Evidence was read on the part of the plaintiffs to prove that Bengal was the most proper place for ships to refit, and that she went thither for that reason, and that this was a voyage of necessity, and not a trading voyage, for she took nothing on board but water, provision, and ballast. It was insisted by the plaintiff's counsel, that though the policy in that part of it which is called the risk, is beginning the adventure from and immediately following her departure from Fort St. George, yet that it comes within the rule in equity, that a conveyance, if different from articles, shall notwithstanding be made conformable to articles, and no instance that articles have been altered to make them similar to a subsequent conveyance; and therefore, upon this reasoning, the policy must be made agreeable to the original agreement, or minutes, called the label, for merchants rely so much upon the label, that the policy is rarely made out in many instances, unless in a case of loss.

For the defendants, the company, it was said that the *Eyles* did not go directly to Bengal, but to a place called Massapatan,

which was not in the proper road, but for the benefit of the captain, who stayed there six days merely for the sake of private trading; that the loss likewise was not at Fort St. George, or on a voyage from thence to England; that from Fort St. George to Bengal is a hazardous voyage; a ship might safer make the whole voyage from Fort St. George to England, and therefore nothing but the strongest necessity could warrant such a voyage, and that it is impossible but there must be timber enough at Fort St. George, which is undoubtedly the largest settlement belonging to the East India Company, to mend a leak, without going such a dangerous voyage merely to refit.

LORD CHANCELLOR. — This is properly a question at law, Whether it is such a loss as is within the terms of the policy?

The first consideration is, What was the real agreement?

2dly. Whether there is any breach of this agreement, by a loss within the terms of the policy?

Now the label is a memorandum of the agreement, in which the material parts of the policy are inserted, — the master's, the ship's name, the premium, and the voyage.

In the label the words are, "at and from;" this certainly includes the continuance at Fort St. George, and in the first part of the policy the voyage is described in the same manner; but in the latter, according to the constant form, it points out what shall be called the risk, and the adventure there is confined to the departure only from Fort St. George.

It has been contended on the part of the plaintiffs that [547] it ought to be construed equally the same as if the words "at and from" were actually inserted in this part of the policy.

It is pretty difficult to reconcile the first part of the policy, and the latter; but the label makes it very clear, for that considers the voyage and the risk as the same, and therefore it was only the mistake of the clerk, which ought to be rectified agreeable to the label.

As to the second question, Whether there has been a breach, or, in other terms, a loss, this is not so properly determinable in equity.

Two reasons have been assigned by the plaintiff's counsel for coming into this court: First, That the insurance is in the name of a trustee: if the trustee had refused the *cestui que trust* his name in an action at law, there might have been some pretence;

but upon this general ground only of a trust, I should at this rate determine all policies, without giving the company the advantage of a trial.

Secondly, That the loss is plainly and clearly according to the agreement, and if it was so, to be sure I might determine it here; but this is far from being the case.

The general principles laid down by the plaintiff's counsel are right, as stress of weather, and the danger of proceeding on a voyage when a ship is in a decayed condition; and in such a case, if she went to the nearest place, I should consider it equally the same as if she had been repaired at the very place from whence the voyage was to commence, according to the terms of the policy, and no deviation. *Guibert v. Readshaw*, Park on Insurance, 344.

It is a very material circumstance that the governor ordered the lading to be taken out, to show the necessity of the ship's being repaired; but there is not a syllable of proof why she might not have been equally repaired at Fort St. George.

But there is one part of this case, which differs from all others whatever, and that is, as to the certain time the voyage was to commence. Now the fact is, that the ship was lost in July, 1733, three weeks before the time of making this policy; so that clearly the ship was not at Fort St. George at the time the agreement was made, and therefore it is a material consideration whether this comes within the agreement.

For the plaintiffs, indeed, it is insisted she was at Fort St. George the February before in her voyage to England, and that as she went out of necessity to Bengal for the sake of repairing, that circumstance must be laid entirely out of the case, and the commencement of the adventure must be dated from this February, when she came with full intention to proceed for England. This observation perhaps may be a very material one, but it is proper merchants should determine what is usual in these cases.

A question arose upon settling the issues, Whether the words in the risk, beginning the adventure from and immediately following her departure from Fort St. George, could not, according to the natural construction, be referred to her first arrival at Fort St. George in her way to England?

LORD CHANCELLOR. — There was a case before me, upon a trial at Guildhall, where the owners of this very ship *Eyles* were plaintiffs, and the Royal Assurance Company defendants; and it was

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then debated, Whether the words “at and from Bengal to England” meant the first arrival of the ship at Bengal? And it was agreed the words “first arrival” were implied, and always understood in policies; for these reasons his Lordship directed the issues in the manner hereafter mentioned. See *Chitty v. Selwin*, 2 Atk. 359.

It was insisted by the counsel for the company that Halhead, at the time he came for the policy, should have compared it with the label, that, in case of a variation, it might have been rectified upon the spot, before he took away the policy; and therefore the difference, though a material one, must now prevail.

There is no colour for this objection, because Halhead was a mere agent or servant to the owner of the ship, and not at all necessary that he should be so exact as to compare the label and policy at the time he fetched it.

His Lordship ordered the parties to proceed to a trial at law in the Court of Common Pleas in London, the next term, upon the following issues:—

First, Whether by the label, whereon the policy was made out, it was agreed or intended that the adventure on the ship *Eyles* should begin from and immediately on her first arrival at Fort St. George, in her homeward-bound voyage, or at any other, and what time?

Secondly, Whether the loss in July, 1733, was a loss during the voyage, and according to the adventure which was agreed upon, or intended to be insured by the said label or memorandum? Reg. Lib. B. 1739, fol. 65.

N. B. On a trial at Guildhall the jury found against the company on both issues.

Ionides and another v. Pacific Fire and Marine Insurance Company.

L. R. 6 Q. B. 674–686; 7 Q. B. 517–526 (s. c. 41 L. J. Q. B. 33, 190; 25 L. T. 490; 26 L. T. 738).

Insurance. — Policy to cover Goods upon Ship or Ships to be declared. — [674] Stamp.

The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description in the policy to which the assured elects to apply the policy; the object of the declaration of the vessel's name is to identify the particular adventure, and the assent of the

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underwriter is not required to the declaration, for he has no option to reject any vessel which the assured may select.

If a representation be made by the assured to an underwriter, however honestly and innocently, that a ship is new, when in fact she is old, a policy of insurance of goods on board of her made by him will be vitiated, for the age of the vessel must be material in considering the premium.

If the description in a policy of insurance designates the subject with sufficient certainty, or suggests the means of doing it, a mistake as to the name of the ship or as to other particulars will not annul the contract, and a mistake in the name of the vessel, which does not prejudice the underwriter, does not defeat the policy.

The plaintiffs by order of K., at Hamburg, opened with the defendants a policy on hides by ship or ships to the extent of £5000. The slip was signed on the 23rd of September, 1869, but the policy had not then been made out; on the 3rd of February, 1870, one of the plaintiffs went to the defendants' office, taking with him the slip for the £5000 policy, and filled up two slips, one for £2455 on hides, per *Socrates*, and another slip for £2500 on hides by another vessel; he stated to the defendants' clerk that it would be more convenient to both parties to have two separate policies, instead of drawing up an open policy for £5000, and then declaring it on £4955. The defendants' clerk acquiesced, and initialed the two slips, and afterwards the policies were executed by the defendants. There was a Norwegian ship, the *Socrates*, and a French ship, the *Socrate*, both described in the *Veritas*, the risk on the latter being greater than on the former. The hides insured by the policy were shipped on board the *Socrate*, and lost. At the trial the jury found that the parties on entering into the contract both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, and that the defendants did not mean only to insure hides on board the *Socrates*.

Held, affirming the judgment of the Queen's Bench, that the defendants, being bound on the 3rd of February to insure hides on board any ships selected by the plaintiffs, the misnomer was of no consequence, and the defendants were liable.

By 30 Vict., c. 23, s. 7, no contract or agreement for sea insurance shall be valid, unless expressed in a policy.

Held, affirming the judgment of the Queen's Bench, that notwithstanding that statute, the slip might be given in evidence, though not valid as a contract, as evidence of the intention of the parties.

This was an action upon insurance policies. The nature of the case and the facts appear from the judgment of the Court of Queen's Bench delivered by BLACKBURN, J., and the case as set down for argument in the Exchequer Chamber, as below set forth.

[678] June 24. The judgment of the Court (COCKBURN, Ch. J., BLACKBURN and HANNEN, JJ.) was delivered by

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BLACKBURN, J. — This was an action on four different policies of marine insurance made by the defendants with the plaintiffs.

The plaintiffs are brokers, who, as is common, enter into policies in their own names, but on behalf of and to protect the interest of different constituents. No notice was given to the defendants for whom the different policies subscribed by them were made, but from the ordinary course of business they must have known that the plaintiffs probably had principals, and nothing was done by the plaintiffs to justify the defendants in concluding that the principals in the different policies were the same person. In fact, the policies which come in question in the present action were made for two different firms, Messrs. Kalkman and Messrs. Gayen, both of Hamburg.

In order to make the points raised at the trial and discussed in Court intelligible, it is necessary to state what was the position of the plaintiffs with regard to both these firms in the latter part of January, 1870, when the transactions took place which give rise to the present dispute.

* The plaintiffs, in pursuance of instructions received from [* 679] Messrs. Gayen, had entered into policies in conjunction with each other to cover hides to a considerable value on ship or ships to be declared. The defendants had subscribed one of these policies for the amount of £2354. Another of the policies was subscribed by another company, the Progress, which had failed, and was being wound up. So many interests had been declared on these policies that there remained so little open on them to declare that the proportion on the defendants' policy left open would be £725, and that on the policy in the Progress £121.

In this state of things the plaintiffs received from Messrs. Gayen a letter dated the 23rd of January, written from Hamburg, directing them to declare on these policies to cover hides shipped on the *Socrates*, Captain Jean Card, from a port in the Brazils to Hamburg. The plaintiff Chapeaurouge having received this letter on the 24th of January, directed one of his clerks, Lambert, to go to the office of the defendants, and there declare on the *Socrates* for £725, so as to fill up the defendants' ship or ships policy, and at the same time to see if the defendants would at the same premium reinsure the portion of the risk covered by the policy in the insolvent company, the Progress, viz. £121.

The letter of instructions was not by him, but the Veritas was

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lying on the table, and on looking into it the plaintiff and his clerk saw in the register, which is in alphabetical order, the *Socrates*, Captain C. J. Albertson, a new Norwegian vessel, and next to it the *Socrate*, Captain Jean Card, an old French vessel. Had the plaintiff recollected that the letter described the vessel as the *Socrates*, Captain Jean Card, he would probably have conjectured that the inaccuracy was in the name of the vessel, and that, as the fact turned out to be, the hides were shipped on board the *Socrate*; but not recollecting this, he observed to his clerk that a Norwegian ship of that character was very likely to be engaged in that trade, or words to that effect. The clerk went down to the office, and there saw the defendants' principal manager, Drummond. He then indorsed on the policy a declaration of interest by the *Socrates*, which he handed to Drummond to initial, and at the same time requested him to insure on the same ship £121, by way of reinsurance of what had been insured in the Progress Company.

[* 680] * Drummond, turning to the Veritas, and there seeing the *Socrates*, asked if that was the ship. Lambert replied that "he thought so;" and Drummond then initialed the declaration. At the same time a slip was prepared for a policy on hides, per *Socrates*, to cover £121 at 66s. per cent, being the same premium. No discussion took place about the premium, probably because the transaction was so small, and was entered into rather to oblige a good customer than with any view of making a profit; but there can be no doubt that the premium on an old vessel such as the *Socrate* would have been higher than that on a new one such as the *Socrates*, though the difference on such a sum as £121 would not have been more than a few shillings, and was probably neglected by both parties. The policy for £121 was afterwards made out and executed. This finished the transactions so far as the plaintiffs were acting for Messrs. Gayen.

The 3rd count was on the declaration on the ship or ships policy to recover the £725. The 4th count was on the policy for £121, and in both these counts the interest was averred to be in Messrs. Gayen, and the policies to be made on their behalf.

The plaintiffs had also opened with the defendants a policy on hides, by ship or ships to be declared, for £3000. This had been done on behalf of Messrs. Kalkman. The plaintiffs had also received instructions from the same parties to open a further

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policy of the same nature to the extent of £5000, and had agreed with the defendants for it. The slip was signed, but the policy had not yet been prepared. On the 3rd of February there had been so many interests declared on the £3000 policy that there remained open on it only £245.

This being the state of things, the plaintiffs received a letter from Messrs. Kalkman, informing them that they had hides to the value of £2700 coming by the *Socrates* from Brazil to Hamburg, and also hides to the value of £3600 coming by the *Sophie*, and desiring them to insure £1100, and to declare on their open policies for the residue.

It will be observed that the interest open on the policy for £3000, viz. £245, the £5000 for which the slip was signed, though the policy was not executed, and £1100, would, together, make £6345, being £45 more than the amount coming by the two vessels, as * announced by the letter of the 3rd of [*681] February. The plaintiffs procured a policy for £1100 on the hides per *Sophie*, and then, on the 4th of February, the plaintiff Chapeaurouge went in person to the defendants' office; he there saw a different clerk of the defendants, one Lark, and there was no controversy of testimony between them as to what took place. The plaintiff indorsed on the back of the £3000 policy a declaration of interest on hides per *Socrates* to the extent still open on the policy, viz. £245. He at the same time took the slip for the £5000 policy on hides by ship and ships, and taking up two pieces of paper wrote out a slip for a policy for £2455 on hides per *Socrates*, and another slip for a policy for £2500 on hides per *Sophie*, and laid those four documents before Lark. Lark asked what this meant, and Chapeaurouge said that, instead of drawing up an open policy for £5000, and then declaring on it for £4955, which would leave so small a balance as £45, it would be more convenient for all parties to have two ship policies. Lark assented and initialed the declaration and the two slips.

The plaintiff Chapeaurouge went away, and soon after the two policies on hides by the *Socrates* and hides by the *Sophie* were duly executed on behalf of the defendants.

The 1st count was on the declaration of interest on the open policy of £3000 to recover the £245. The 2nd count was on the policy on the *Socrates* to recover the £2455. In both these

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counts the interest was averred to be in Messrs. Kalkman, and the policies to be made on their behalf.

The defendants ultimately paid money into Court on the 1st and 3rd counts, being those on the ship or ships policies, which the plaintiffs accepted, so that no question arose on the trial as to those two counts, though it has been necessary to mention them in order to render the defence as to the others intelligible.

As to the 2nd and 4th counts, they pleaded several pleas. Those that were material are, the 2nd, *non assumpsit*; the 5th, that the hides were not shipped by the *Socrates*; the 6th, that the defendants were induced to subscribe the policy by a misrepresentation of a material fact, viz. that the hides were shipped by the *Socrates*, whereas they were shipped by the *Socrate*; the 7th, a denial of the loss, as alleged; and, lastly, an additional [* 682] *plea, that the letter in which the name of the captain was given was not communicated.

On all these pleas issues were joined, which came on to be tried before my Brother HANNEN and a special jury at the sittings at Guildhall. Evidence to the effect above stated was given. It was not disputed that hides to the value insured were, in fact, shipped on the *Socrate* on behalf of the parties interested, and that they had no hides whatever on board the *Socrates*, and that the *Socrate* was totally lost, with the hides on board. My Brother HANNEN reserved leave to the defendants to enter a verdict for them on all or any of the issues, subject to the finding of the jury on the question which he left to them, which was, whether the parties, in entering into the contracts, both meant to insure the hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, or whether the defendants meant to insure hides on board the *Socrates*. The jury answered this question in favour of the plaintiffs.

Mr. Milward obtained a rule *nisi* to enter the verdict according to the leave reserved. He also obtained it for a new trial, on the ground of misdirection; but that latter ground was merely *pro majore cautela*, in case the point was not properly raised.

We have come to the conclusion that the plaintiffs are entitled to retain their verdict on all the issues on the pleas to the 2nd count, that on the policy for £2455; but that the defendants are entitled to have a verdict entered for them on the 2nd

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and 6th pleas, so far as those pleas relate to the 4th count, namely, that on the policy for £121.

Our reasons for this distinction are as follows: The contract of an underwriter who subscribes a policy on goods by ship or ships to be declared is, that he will insure any goods of the description specified which may be shipped on any vessel answering the description, if any there be, in the policy, on the voyages specified in the policy, to which the assured elects to apply the policy. The object of the declaration is to earmark and identify the particular adventure to which the assured elects to apply the policy. The assent of the assurer is not required to this, for he has no option to reject any vessel which the assured may select; nor is it necessary that the declaration should do more than identify the *adventure, and so prevent the possible dishonesty of [*683] a party insured, who might intend to apply the policy to particular goods, so that they should be at the risk of the assurers, and he could come on them if there was a loss; and then, when those goods had arrived safely, to pretend that he intended to apply the policy to another set of goods still subject to risks. *Harman v. Kingston*, 3 Camp. 150 (13 R. R. 775); *Robinson v. Touray*, 3 Camp. 158 (13 R. R. 781).

It seems plain, therefore, that the declaration of the *Socrates* on the ship or ships policies was, under the circumstances, amply sufficient to show that the assured had elected to attach those policies to the goods actually shipped on board the *Socrate*; and, consequently, that the defendants were well advised when they withdrew their defence to the 1st and 3rd counts. But on the 24th of January, when the policy for £121 was agreed upon, the defendants were under no obligation to subscribe any policy for that £121. They had an absolute right to decline to enter into a contract except on their own terms as to premium, or, indeed, into any contract at all unless they liked. And though we see no reason to doubt that the jury were quite right in finding that both parties were intending to insure the goods by the ship on which they were actually shipped, yet, when we find it not disputed that the one party expressly asked the question whether the ship was the Norwegian ship *Socrates*, and was told by the other party that he thought it was, we cannot think that there was any evidence on which the jury could properly find that the defendants entered into a contract to insure by any other ship than the *Socrates*. The

most that could be legitimately found was that there was no contract, the parties not being *ad idem*. And we think also that, if the representation was made, however honestly and innocently that the ship was a new ship, when, in fact, she was an old one, the policy was vitiated thereby, for the age of the vessel must be material in considering the premium. It was argued that a representation, if only as to an expectation or belief, is substantially complied with if the assured really had honestly entertained that expectation on sufficient grounds, and that the representation that "he thought" the ship was the Norwegian ship was literally true.

We think this expression tantamount to an assertion that [* 684] she was * the Norwegian; but even were it otherwise, the letter of advice would, but for the carelessness of those who read it, have made them aware that the ship was that of which the captain was Jean Card, and therefore the plaintiffs had not reasonable grounds for believing that she was the Norwegian ship.

But, though we come to this conclusion as to the smaller policy of insurance for £121, we think the case is quite different as to the other policy for £2455. Mr. Milward argued that there could be no difference, for the plaintiffs were the persons who made both contracts, and made them both with the defendants; and therefore, he argued, all that passed on the 24th of January between Lambert, representing the plaintiffs, and Drummond, representing the defendants, must be considered as present to the minds of the plaintiff Chapeaurouge in person, and Lark, representing the defendants, on the 4th of February, and as if then virtually repeated. But the transaction on the 24th of January was respecting one contract, in fact made for one principal, and the transaction on the 4th of February was respecting another contract, in fact made for another principal; and the defendants knew that they were almost certainly made for undisclosed principals, and had no reason to believe that the principals in the two contracts were the same. We think, therefore, that, even if the defendants had, in fact, on the 4th of February, recollected all that took place on the 24th of January, they would not have been justified in coming to the conclusion, without further inquiry, that the real parties were the same, and meant to make a similar contract. The identity of the name of the ship, and of the voyage described, would no doubt raise a reasonable suspicion that both parties meant to describe the same ship; but that was all.

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And, in fact, there can be no doubt that the plaintiff and Lark, if they ever knew what took place between Lambert and Drummond, did not, on the 4th of February, think of it. We think, therefore, that it is clear that the transaction of the 4th of February must be looked at as if that of the 24th of January had happened subsequently, or had never happened at all. And in looking at it in this way, the fact that a slip for a policy for £5000 on hides by ship or ships to be declared had been prepared and was in existence, is of great importance. The slip is, in practice, and according to the understanding of those engaged in marine insurance, the *complete and final contract between the parties, [*685] fixing the terms of the insurance and the premium, and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith, for which he would suffer severely in his credit and future business.

The Legislature, for the purpose of protecting the revenue, had by the very strongest enactments provided that no such instrument should be given in evidence for any purpose ; but all those enactments are repealed by the 30 Vict., c. 23, and the law is now governed by the 7th and 9th sections of that Act. By s. 7 no contract or agreement for sea insurance shall be valid unless expressed in a policy. And by s. 9 no policy shall be pleaded or given in evidence in any Court unless duly stamped.

As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid, that is, not enforceable at law or in equity ; but it may be given in evidence wherever it is, though not valid, material ; and in the present case it is material. The defendants could not, without a breach of faith, repudiate that engagement, and they never proposed to do so. And whilst they adhered to that engagement it was not material to them whether there were or were not facts known to the insured, and not known to them, which might make the vessel a less eligible risk, for they were going to take her, whatever she was, at a premium, the amount of which was already finally fixed. Mr. Milward's argument was, that they were not legally bound to do so ; and that, therefore, when they entered into a substituted policy on a ship, they were entitled to hold it avoided for want of a disclosure which, in fact, would have made no difference. This would be to make the rule, that contracts of marine insurance are considered as *uberrimæ fidei*, a means in this case of

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working fraud. In fact, the case is exactly as if the underwriter had said, "I have finally made up my mind to take the policy on unalterable terms: nothing you can disclose to me will make the least difference, and therefore you need disclose nothing." It is true the last words were not expressed, but they were evidently implied.

The only remaining point arises, therefore, on the misnomer of the vessel, which was called in the policy the *Socrates*, [* 686] when, in * fact, she was the *Socrate*. But the rule of law, both in England and America, is that stated by Mr. Phillips (Phillips on Insurance, s. 430), that if the description in the policy designates the subject with sufficient certainty, or suggests the means of doing it, a mistake of the name of the ship, or of other particulars, will not defeat the contract. In *Le Mesurier v. Vaughan*, 6 East, 382 (8 R. R. 500), where the broker had received instructions to insure goods by an American ship called the *President*, and by mistake insured as on a ship called the *American President*, it was held that, it being clearly proved by the invoice and letter of instructions that the goods were on the *President*, and that the name was a mistake, the plaintiffs might recover. It is true that in the judgment some weight seems to have been given to the expression contained in the ordinary Lombard Street policy, "or by whatever other name or names the said ship should be called," and that those words are omitted in the form of the policy used by the defendants in the present case. But we think this far too narrow a ground, and that the real ground of the decision is that which is expressed by Lord ELLENBOROUGH, that where it can be proved that it is a clear mistake, and the underwriter cannot be prejudiced by the mistake, it is of no consequence. The jury here have found, and were justified in finding, that neither party cared what the name of the ship was, as they meant to insure the goods by the ship on which they were really shipped.

When the other policy for the £121 was made, it appears plainly that the underwriter really believed that the ship was the Norwegian ship, and that was a matter very material to the risk, and the underwriter was free to accept or refuse that risk, and therefore the mistake in the name was of importance.

We think, therefore, that the rule should be made absolute to enter a verdict for the defendants on the 2nd and 6th pleas, so far as they relate to the 4th count, and discharged as to the residue.

Rule accordingly.

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The plaintiffs appealed from this judgment, and the question was argued in the Exchequer Chamber on a case which stated as follows:—

1. The plaintiffs are ship and insurance [L. R. 7 Q. B. 518] brokers, carrying on business in the City of London, and have for some years been in the habit of effecting insurances by the instructions of a Mr. Schaffler, an insurance broker at Hamburg. Some of these insurances were on behalf of a Mr. Gayen, and others on behalf of Messrs. Kalkman, both merchants at Hamburg.

2. The defendants are a company, carrying on business in the City of London as underwriters, and prior to August, 1869, had been in the habit from time to time of effecting insurances for the plaintiffs on ship or ships.

3. On the 12th of August, 1869, the plaintiffs effected on behalf of Messrs. Kalkman with the defendants a policy of insurance for £3000 on hides per ship or ships as might be declared from any port or places at the Brazils to any port of call in the United Kingdom. On the 13th of August another similar policy was effected for £2354, on behalf of Mr. Gayen.

4. On the 23rd of September, 1869, the plaintiffs received a letter from Schaffler, of which the following are the material parts: “Messrs. Kalkman Brothers hereby request you to open at once a policy of insurance on hides to the amount of £5000, as by their next letter they will have to declare £3000 to £4000 on that head.”

5. On receipt of this letter the plaintiff Chapeaurouge had an interview with Mr. Drummond, the underwriter of the defendants, when a slip was submitted to and accepted by Drummond, on behalf of the defendants, for an insurance on hides by ship or ship and steamer from Brazils to the United Kingdom, ^{and} _{or} steamer to Hamburg, at 60/ to the amount of £5000, not more than £2500 by each vessel.

6. At this interview, according to the evidence of Drummond, the plaintiff Chapeaurouge stated that the ships to be declared under it would be first-class vessels, and that the consignees would be first-class people. Chapeaurouge denied this; but said that, in answer to inquiries from Drummond upon the subject, he might have referred to the declarations made upon previous policies, which in many instances were on first-class * Ger- [*519]

man ships, but that he did not remember any such thing having occurred.

7. The plaintiff Chapeaurouge then filled up a slip on one of the printed forms kept by the defendants, more in detail, but corresponding with the other slip, and left it at their office. [The slip as filled up purported to be an insurance on hides by "ships," for £5000.]

8. On the 21st day of January, 1870, a letter, of which the following is an extract, was received from Schaffler by the plaintiffs: "Hamburg, 19th January, 1870. Messrs. Ionides & De Chapeaurouge, London. Messrs. Kalkman declare as follows . . . Cotton from Ceara to Hamburg, per *Socrates*, Jean Card. K 1 / 100 — 100 bales cotton, valued at £730."

9. On or about the 23rd of January, 1870, the plaintiffs received a letter from Schaffler, dated the 22nd day of January, 1870, of which the material part was as follows: "I beg to refer you to my respects of yesterday's date, and this is to inform you that Mr. Gayen is declaring to-day from Ceara to Hamburg by the *Socrates*, bill of lading dated the 23rd of December last year, made out to order: 1400 dry salted hides, £1450. Mr. Gayen keeps upon his hide policy only £1500; still as, however, he does not expect any fresh shipments near at hand, he does therefore not feel disposed at the present moment to enter upon fresh insurances."

10. On the 24th of January, in pursuance of the instructions contained in the above letter, the plaintiff Chapeaurouge made an indorsement upon the policy of the 13th of August, 1869, as follows: "The following interest is now declared and agreed to attach to this policy. . . . Per *Socrates*, Ceara to Hamburg. B/£—. 23rd December. 1400 dry salted hides, valued at £1450. London, 24th of January, 1870."

He then gave the policy to his clerk, Lambert, and directed him to take it to the defendants.

11. At the same time Chapeaurouge having noticed that a portion of the hides belonging to Mr. Gayen were insured in the Progress Insurance Company, which had failed, instructed Lambert to offer that portion of the insurance to the defendants, and wrote in pencil in the fold of the said policy the words following: "Re-insurance, Progress, £121."

12. At this interview between Chapeaurouge and Lambert, they both referred to the *Veritas*, and found in it that there

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were two * ships, — The *Socrates*, a Norwegian ship, Albertsen, master, built in 1866, and the *Socrate*, a French ship, Jean Card, master, built in 1856.

13. Chapeaurouge observed to Lambert that he supposed that the *Socrates* referred to in the letter of the 22nd of January was the Norwegian ship, as that ship was most likely to be engaged in the trade, or words to that effect.

14. In consequence of these instructions Lambert called upon Drummond on the same day, and handed him the policy of the 13th of August, which Chapeaurouge had indorsed as above, to initial, and at the same time he offered the reinsurance for £121.

15. Drummond turned to the *Veritas*, and finding in it entries of the *Socrates* and *Socrate*, asked if the *Socrates* was the ship. Lambert replied that he thought so, whereupon Drummond handed the policy to his clerk, Lark, to initial, and at the same time a slip was prepared for the reinsurance, which risk was taken without discussion at the same premium as the other policies.

16. The following is the account given by Lambert of what passed at the interview: "He, Drummond, asked me to show him the ship. I found it in the *Veritas*. There are two ships, the *Socrates* and the *Socrate*. I said, 'I think this is the ship' (pointing to the *Socrates*). I believed it to be the ship. I did not tell him what information I had. I then prepared a slip, and this is it. And further (on cross-examination), I mentioned the name *Socrates*. The French *Veritas* was on the table. I think I took it up. I pointed to the *Socrates*. I suppose I led him to believe it was the *Socrates*."

17. The following is the account given by Drummond: —

"The plaintiff's clerk, Lambert, called on me on the 24th of January and presented me with the open policy and a declaration of the *Socrates*, which I passed to my assistant for registering in our books. He then produced a slip for £121, on which I referred to the *Veritas*. I found two vessels, and said to him, 'Which is your vessel?' He said, '*Socrates*.' In taking that risk I believed I was insuring a risk on a specific vessel, the *Socrates*, Captain Albertsen, the Norwegian. In issuing the policy of that date, I thought I was insuring the *Socrates*. The risk on the *Socrate* was * decidedly greater than on the *Socrates*. I would not have [* 521] insured the *Socrate*."

18. The French *Veritas* is a book in which are entered the

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names and descriptions of foreign vessels, and it is usual and customary for underwriters and others to refer thereto when questions arise as to the names and descriptions of foreign vessels.

19. On the 3rd of February the plaintiffs received a letter from Schaffler, an extract from which is as follows:—

“Messrs. Kalkman declare further on hide policy by *Socrates*, Captain Jean Card, from Ceara to Hamburg, 2600 dry-salted hides, valued at £2700.

“The balance which Messrs. Kalkman have still open at your place is to the amount of £245 on policy No. 13 (that is to say, policy of August 12th, for £3000), and £5000 on policy No. 14 (that is to say, slip of the 23rd of September), out of which £2500 can be declared by ship bill of lading, dated January. As the last policies, so far as I can remember, are running up to June, this declaration will be therefore quite in order. In case, then, that you are able to add on the same conditions another sum of £1100, you may further declare and thus close the hide policy per *Sophie*, Captain Boltzen, from Ceara to Hamburg. 3444 dry-salted hides, £3600.

“*Sophie* is 5.6.1.1., K.’s own ship, and the *Serie* is so large that I hope you will have no difficulty in succeeding. In any case, I must request you to let me have at once a telegram from you.

“Bill of lading per *Sophie* is likewise dated January in the present year. Moreover, the said gentlemen are declaring on cotton, &c., policy per *Sophie*, Captain Boltzen, from Ceara to Hamburg, U. K. 45 bales of cotton valued at £340.

“I am looking forward to your telegraphic message.”

20. In consequence of this letter, Chapeaurouge called the same day upon the defendants, and saw their clerk, Lark. Chapeaurouge indorsed on the back of the £3000 policy, of the 12th of August, 1869, which is referred to in the above letter as No. 13, a declaration of interest on hides per *Socrates* to the extent still open on the policy, viz. £245.

21. He at the same time took the slip for the £5000 policy, of the 23rd of September, 1869, mentioned in paragraph 7, [* 522] and filled * up the two slips, one for £2455 on hides per *Socrates*, and the other for £2500 on hides per *Sophie*.

22. Chapeaurouge suggested to Lark that it would be more convenient for both parties to have two separate policies instead of

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drawing up one open policy for £5000 and then declaring on it for £4955, which would leave the small balance of £45; and Lark thereupon initialed the above declaration and the two slips, and in due course the policies were executed by the defendants. The policy, on which the present question arises, was an insurance for £2455 on hides valued at £2700, from Ceara to Hamburg, on board the ship *Socrates*, whereof — is master.

23. It was admitted between the parties that the hides in which the plaintiffs and their principals were interested were loaded on board the *Socrate*, and not the *Socrates*, in the French *Veritas* mentioned, and that whilst on board that vessel, on a voyage from Ceara to Hamburg, they were lost by the perils insured against.

24. It was also admitted that there were in existence at the time of the insurance the two said vessels, as described in the *Veritas*, and that the description therein given of them is correct, and that the risk on the *Socrate* was greater than on the *Socrates*.

26. The Judge left to the jury the question, amongst others, whether the parties in making the policies both meant to insure the hides by the vessel on which they were shipped, whatever her name might be, though they supposed her to be the *Socrates*, or whether the defendants meant to insure hides on board the *Socrates*.

27. The jury found for the plaintiffs upon the questions submitted to them, and the verdict was entered for the plaintiffs, subject to leave reserved to the defendants to enter a verdict for them.

28. On the 14th of January, 1871, the defendants obtained a rule *nisi* to set aside the verdict so entered for the plaintiffs, pursuant to leave reserved by the Judge, on the ground that no insurance was ever effected on goods on board the *Socrate*, and no loss was proved within the meaning of the policies declared upon; or why a new trial should not be had between the parties, on the ground that the learned Judge misdirected the jury in putting to the jury as material whether they thought the parties intended to insure the hides by whatever ship they might be carried, or that there were any evidence proper to be submitted to * them that the parties insured, or meant to insure, [* 523] hides carried by any other ship than the *Socrates*, and that they might properly find for the plaintiffs on the pleas of concealment and misrepresentation upon the evidence of the captain's

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name, under the circumstances proved; and also on the ground that the verdict was against the evidence.

29. The rule came on for argument in Trinity Term, 1871, when the Court made it absolute to enter a verdict for the defendants upon the reinsurance policy and discharged it as to the other.

The defendants appealed against this latter decision.

The case was argued by Milward, Q. C., for the defendant, and Cohen for the plaintiffs.

KELLY, C. B. — In this case we have to consider two questions: first, whether the verdict entered for the plaintiffs is supported by the evidence; secondly, whether a document called a slip, which was received in evidence at the trial, is admissible. The [*524] policy is *upon goods coming from Brazil by a ship described as the ship *Socrates*; but the fact was that the goods were shipped on board a French ship, the *Socrate*.

The first point is, whether the ship *Socrates* is so named in the policy as to make it an essential part of the contract between the parties that that particular ship, and no other, should be the subject of the policy; or whether the contract was such — and that not inconsistently with the language of the policy itself — as to make it apply to any ship or ships by which the goods (a cargo of hides) were coming from Brazil to England.

It appears from the case, that at an early period of the transactions several communications had taken place between the parties, and that there was a Norwegian ship *Socrates*, commanded by one Albertsen, and a French ship *Socrate*, commanded by one Jean Card, both described in the Veritas. On the 23rd of September, 1869, the plaintiffs, on behalf of Messrs. Kalkman, opened with the defendants a policy on hides by ship or ships to the extent of £5000. The slip was signed, but the policy had not been made out. On the 3rd of February the plaintiff Chapeau-rouge went to the defendant's office, taking with him the slip for the £5000 policy of the 23rd of September, 1869, and filled up two slips — one for £2455 on hides per *Socrates*, and the other for £2500 on hides per *Sophie* — and suggested to the defendants' clerk that it would be more convenient to both parties to have two separate policies instead of drawing up an open policy for £5000, and then declaring it on £4955. The defendants' clerk acquiesced, and initialed the two slips, and in due course the policies were executed by the defendants. Some other trans-

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actions at the same time took place between the parties relating to other policies, which formed the subject of discussion in the court below, but from which there has been no appeal. It thus appears that this policy on hides was framed and executed upon a declaration of a ship, or it may be ship or ships, and consequently it was competent to the parties to name any ship they thought fit, and that in pursuance of that they named the ship *Socrates*. It then becomes necessary to consider, when they named the *Socrates*, what the parties really intended.

Authorities have been cited to show that in a certain class of * cases the precise name of the ship mentioned [* 525] in the policy is not material, as, for example, where the *Leonard* was written instead of the *Leopard*. *Hull v. Molineaux*, 6 East, at p. 385. This is a case somewhat of the same nature, and I think the parties did really enter into this contract for a policy in pursuance of an agreement between them that the policy was to be on hides by ship or ships to be declared. It was admitted that hides to the value insured had been shipped on board the *Socrate* by the parties interested, and that they had no hides whatever on board the *Socrates*, and that the *Socrate* was a total loss. At the trial the learned Judge left it to the jury to say whether the parties entering into this contract meant to insure hides by the vessel on which they were actually shipped, whatever her name might be, though they supposed it to be the *Socrates*, or whether the defendant meant to insure hides on board the *Socrates*. The jury answered this question in favour of the plaintiffs. If the policy was executed in pursuance of the contract of the 23rd of September, and it was the intention of the parties that that contract was to be on hides by ship or ships to be declared, then the name of the ship on which the hides were shipped becomes immaterial. I must, however, say I think that the mode in which the policy was prepared and executed was of a somewhat irregular character; but the jury have found their verdict for the plaintiffs, and I think that verdict right upon the evidence.

The second question is, whether this ship was admissible in evidence at all, and if it were, whether it was admissible in evidence for the purpose for which alone it was used on the trial of this cause. Now, it is quite true that, under the statute in question (30 Vict., c. 23, ss. 7, 9), the document called a slip,

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although it is binding in point of honour between the parties circumstanced as these parties were, is made void as a contract, and, as such, inadmissible in evidence. It is not like an agreement for a lease, upon which an action can be brought for the non-acceptance of the lease, or the refusal to grant a lease; but, as a contract for a policy of assurance to be afterwards made, it is a mere nullity.

It does not, however, follow that it is not admissible in evidence for a great variety of purposes. In this case it is unnecessary

to do more than to consider whether it is admissible in [* 526] evidence for * the purpose of showing what the two parties

intended at the time they entered into this transaction; in other words, whether they intended it to be a policy pursuant to a previous contract, although that contract was not binding, or whether the policy was a new, separate, and substantive contract, to be construed without reference to the previous acts of the parties. Now, in the first place, it may be observed that its admissibility was not objected to, and on that ground alone I do not think that we could be called upon to exclude it altogether from the case. If it had been applied to a purpose forbidden by the Act of Parliament, I should not have hesitated to say that it ought not to be considered as admitted, or if admitted, applied to any such purpose. But for many purposes it may legitimately be used, as in cases where a fraud is suggested, or where there is a plea, as here, of misrepresentation, the slip may be evidence of the fraud or misrepresentation charged. Suppose a slip, with a view to an insurance from a port in South America which had been under blockade a little while before the date of the policy, and the slip, at the instance of the plaintiff, described the port as an open port, and the question had arisen whether the policy had been procured by misrepresentation, or whether there was a concealment of the material fact that the port had been under blockade; no one can doubt that upon the collateral question of misrepresentation the slip would be admissible in evidence to prove what the plaintiff had represented. It is quite enough, therefore, to say that here it was not given in evidence to prove a binding contract between the parties, or to contradict or to explain, or in any way affect the construction of the policy in question; but it was given in evidence only to show what their intention was in preparing the policy. For that pur-

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pose I am clearly of opinion that it was admissible in evidence and might be used for that purpose. On both points, therefore, we are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

CHANNELL and CLEASBY, BB., and KEATING and BRETT, JJ., concurred. *Judgment affirmed.*

ENGLISH NOTES.

As to the effect of the slip, see also notes to Nos. 19, 20, and 21, of "Contract," 6 R. C. 227.

By the Stamp Act, 1891 (54 & 55 Vict., c. 39, s. 95), (1) "A policy of sea insurance may not be stamped at any time after it is signed or underwritten by any person, except in the two cases following, that is to say,

"(a) Any policy of mutual insurance having a stamp impressed thereon may, if required, be stamped with an additional stamp, provided that at the time when the additional stamp is required the policy has not been signed or underwritten to an amount exceeding the sum or sums which the duty impressed thereon extends to cover.

"(b) Any policy made or executed out of, but being in any manner enforceable within, the United Kingdom, may be stamped at any time within ten days after it has been first received in the United Kingdom on payment of the duty only.

"(2) Provided that a policy of sea insurance shall, for the purpose of production in evidence, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of one hundred pounds."

By section 92 of the same Act, "policy of sea insurance" means "any insurance (including reinsurance) made upon any ship or vessel . . . or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest which may be lawfully insured in or relating to, any ship or vessel," &c.

And by section 91, "'policy of insurance' includes every writing whereby any contract of insurance is made or agreed to be made, or is evidenced."

It would seem from the proviso in section 95, combined with the above definition clauses, that "the slip" is a "policy of sea insurance" within the Act, and may be given in evidence if stamped with a penalty of £100.

In regard to insurances generally it must be kept in mind that the risk, which is the essential foundation of the contract, is continually

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varying, and therefore the ordinary rules of offer and acceptance do not necessarily apply. For *non constat* that that which is offered at one hour is the same thing which is purported to be accepted the next. In marine policies, as we have seen, the initialing of the slip is the critical epoch. Where the question relates to life assurance, it has been held that where the acceptance of a proposal is qualified by the statement that no insurance shall take effect until the premium is paid, the payment of the premium is a condition precedent of the liability attaching. And where before tender of the premium a change occurred in the state of health of the person whose life was proposed for assurance, the company were entitled to refuse to accept the premium, and on their so refusing, there was no contract. *Canning v. Farquhar* (C. A. 1886) 16 Q. B. D. 727, 55 L. J. Q. B. 225, 54 L. T. 350, 34 W. R. 423.

AMERICAN NOTES.

The first principal case is cited in 2 May on Insurance, sect. 566 a, and in 2 Biddle on Insurance, sect. 1261, and 1 Parsons on Marine Insurance, p. 116, and repeatedly in Story on Equity Jurisprudence, to the point that a policy may be reformed *in equity* for mutual mistake, or unilateral mistake and fraud; and so if it differs from the memorandum. Citing also *Gray v. Sup. Lodge*, 118 Indiana, 293; *Baldwin v. State Ins. Co.*, 60 Iowa, 497; *Franklin F. Ins. Co. v. Hewitt*, 3 B. Monroe (Kentucky), 231; *Farmville Ins. Co. v. Butler*, 55 Maryland, 233; *German Am. Ins. Co. v. Davis*, 131 Massachusetts, 316; *Scott v. Prov. M. R. Ass'n*, 63 New Hampshire, 556; *Doniol v. Com. F. Ins. Co.*, 34 New Jersey Equity, 30; *Hay v. Star F. Ins. Co.*, 77 New York, 235; 33 Am. Rep. 607; *Noel v. Pymatuning M. F. Ins. Co.*, 130 Penn. State, 523; *Deitz v. Prov. W. Ins. Co.*, 33 West Virginia, 526; *Snell v. Ins. Co.*, 98 United States, 85; *Wright v. Sun M. L. Ins. Co.*, 29 Upper Canada Com. Pl. 221. The Pennsylvania and Kentucky cases were cases of non-conformity to the company's original memorandum. This principle is also recognized in *Nat. F. Ins. Co. v. Crane*, 16 Maryland, 260; 77 Am. Dec. 289; *Tesson v. Atlantic M. Ins. Co.*, 40 Missouri, 33; 93 Am. Dec. 293; *Phoenix F. Ins. Co. v. Gurnec*, 1 Paige (N. Y. Chancery), 278; 19 Am. Dec. 431, citing the *Matteaux Case*; *Lippincott v. Ins. Co.*, 3 Louisiana, 546; 23 Am. Dec. 467; *Norris v. Ins. Co.*, 3 Yeates (Penn.), 84; 2 Am. Dec. 360. See also *Barnes v. Hekla F. Ins. Co.*, 75 Iowa, 11; 9 Am. St. Rep. 450; *Cont. Ins. Co. v. Ruckman*, 127 Illinois, 364; 11 Am. St. Rep. 121, — in which policies were reformed to conform to the original parol agreement.

No. 22. — *Stribley v. Imperial Marine Ins. Co.*, 1 Q. B. D. 507. — Rule.

No. 22. — *STRIBLEY v. IMPERIAL MARINE INSURANCE COMPANY.*

(1876.)

RULE.

THE date of sailing of a ship on the voyage insured is a circumstance entering into the risk; and where any information in the possession of the assured tending to fix the date of sailing (from a foreign port) has not been communicated, it is a proper question for a jury to consider whether the information would have influenced a reasonable underwriter in determining whether to accept the risk or to ask a higher premium.

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1 Q. B. D. 507-515 (s. c. 45 L. J. Q. B. 396; 34 L. T. 281; 24 W. R. 701).

Insurance. — Concealment. — Non-communication by Agent of Assured. [507]

In an action on a policy on the ship *Jessie* "at and from Mazagan to the United Kingdom," it appeared that the ship arrived at Mazagan on the 27th of December, 1873, and that the last news the assured, the plaintiff, had of her was a letter from her captain, dated the 9th of January, 1874, and received on the 21st of January, in which the captain said he had had a fine passage out and had commenced loading, but was delayed by bad weather, and would write again before sailing. The ship had, it afterwards appeared, lost an anchor by bad weather while at Mazagan, and the captain had made a protest on the 3rd of January, but he did not mention the fact in this letter. The plaintiff insured on the 27th of February without communicating to the underwriters the letter of the 9th of January, but through his brokers gave them this information: "I do not know when she sailed, I have not had the sailing letter yet." The *Jessie*, after leaving Mazagan, was lost by the perils insured against. At the trial the sole defence relied upon was that the non-disclosure of the letter was the concealment of a material fact, and avoided the policy.

The Judge left to the jury the questions: 1. Was the ship an overdue ship at the time of the insurance? 2. Was any material fact concealed, and, if so, what? 3. Was there any misrepresentation, and, if so, was it fraudulent? The jury answered all the questions in the negative, and a verdict was entered for the plaintiff.

Held, on a rule for a new trial on the ground of misdirection, and on a motion to enter judgment for the defendants, on the ground that the loss of the anchor was a particular average loss under the policy which ought to have been com-

municated, and that the plaintiff was responsible for the neglect of the captain in not communicating it, first, that judgment could not be entered for the defendants, as the point as to the anchor had not been distinctly taken at the trial, and, if it had, questions relating to it ought to have been left to the jury; and, secondly, on the authority of *Gladstone v. King* (1 M. & S. 35), that the particular average loss was an exception out of the policy, but the innocent non-communication of it by the agent of the assured did not avoid the policy; but that there must be a new trial, for it did not appear that the question had been distinctly put to the jury whether the contents of the letter of the 9th of January and the fact that it was the last letter from the ship, would have influenced the mind of a reasonable underwriter, if communicated.

Declaration on two policies on the ship *Jessie*; one for £350 on the freight, and the other for £500 on ship valued at £2000; alleging a total loss by the perils insured against.

Fourth plea, misrepresentation of material facts.

Fifth plea, concealment.

Joinder of issue.

At the trial before GROVE, J., at the sittings in London [*508] in * December, 1875, it appeared that on the 10th of

December, 1874, the brig *Jessie* sailed from Falmouth in ballast for Mazagan, a port in Morocco, and arrived there on the 27th. At Mazagan she was anchored in a somewhat open roadstead, for the purpose of having her cargo conveyed on board in lighters. While there a gale sprang up, and on the 1st of January, 1875, she was driven from her anchorage and lost her starboard anchor and chain, the captain making the usual protest. On the 9th of January the master wrote a letter to the plaintiff, one of the part owners of the vessel, which was received at London on the 24th. This letter appeared to have been mislaid, but the plaintiff, from his recollection of it, said that in it the master stated that he had had a very fine passage out, that he had arrived on the 27th of December, and had begun loading, but had had very bad weather on the coast, and that he did not know when they would finish, but that he would write again. Plaintiff, however, stated positively that the letter said nothing about the vessel having been driven from her anchorage, and having lost her anchor. This letter was the last news which the plaintiff had of the vessel at the time of the insurance. On the 24th of February the plaintiff, having no further news of the *Jessie*, wrote to his London agents, ordering them to insure ship and freight, adding: "I do not know when she was ready to sail. I have not had the sailing

letter yet." The agent showed this letter to the defendants' underwriter, who, on the 26th, signed the two policies on ship and freight, "lost or not lost, at and from Mazagan to port or ports of call ^{and} or discharge in the United Kingdom." There was evidence that the average time of loading a vessel like the *Jessie* at Mazagan at the same time of year would be between fifteen and twenty days, and twenty-five to thirty days the probable duration of her voyage from Mazagan to England, and that the course of the post from Mazagan was irregular.

It was admitted that the *Jessie*, after leaving Mazagan, was lost by the perils insured against.

The case for the defence was based upon the suppression of the letter of the 9th of January, and evidence was called to show that it would have induced an underwriter to suspect that some casualty had happened to the vessel.

* The learned Judge, in summing up the case, told the [* 509] jury that he did not see that the fact that there was stormy weather on the coast on the 9th of January, and that the ship had lost an anchor, would make much difference as to the risk the ship ran when she afterwards sailed. With regard to the time which, at the date of the insurances, had elapsed since the vessel was heard of, the learned Judge said: "A missing ship may be said to be one which is not heard of after the longest ordinary safe time in which the voyage insured is performed. But this is open to many exceptions. . . . I cannot myself see that there is much distinction, as far as the application of the thing goes, between a missing ship which a man may at once charge the underwriter with, or a missing ship which is overdue. A man is not bound, when a ship is a day late, to assume that a ship is an overdue ship, and inform the underwriters of it. It is a matter for the jury to take a reasonable view of it. One would expect, on the other hand, if the time becomes so long that there really is in a reasonable man's mind an apprehension that the ship may be lost, from the time since which she has sailed, that he ought to communicate it. That again would very much depend on the regularity of the passage and the regularity of the post.

And, after saying that it must be considered whether the delay in the arrival of the vessel was such that the insurer ought to have known that he was imposing on the underwriters a speculative risk, the learned Judge left to the jury the questions: First, was

the ship an overdue ship at the time of the insurance? secondly, was any material fact concealed, and, if so, what? thirdly, was there any misrepresentation, and, if so, was it fraudulent? The jury answered all these questions in the negative, and a verdict was entered for the plaintiff, with leave for the defendants to move.

Notice of motion to enter the verdict for the defendants on the facts admitted at the trial having been given, and a rule *nisi* having also been obtained for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence,

C. Russell, Q. C., and French, for the defendants. — First, the policy being “at and from Mazagan,” the loss of the anchor was really a particular average loss within the meaning of the [* 510] policy, * but it was never mentioned by the captain in his letter, and for this concealment the plaintiff is responsible. The verdict ought, therefore, to be entered for the defendants, as the Court has sufficient evidence to draw the inference that the loss of the anchor and the tempestuous weather at Mazagan would have influenced the defendants in their estimate of the risk. In *Fitzherbert v. Mather*, 1 T. R. 12 (1 R. R. 134), the insurer’s correspondent allowed the sailing letter to go several hours after he knew that the ship was lost, and that was held to vacate the policy. *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, 36 L. J. Q. B. 225, where the agent neglected to telegraph the loss of the vessel, which would have stopped the insurance, is to the same effect.

[BLACKBURN, J. — *Gladstone v. King*, 1 M. & S. 35 (14 R. R. 392), where it was held that the non-disclosure by the agent without fraud of an accident to the vessel did not vitiate the policy, but only amounted to an exception of the risk arising from that accident, is an authority against this contention. It appears, also, that the defendants’ case was not put in this manner at the trial.]

Secondly, there was a misdirection. The learned Judge lays stress upon what was passing in the mind of the plaintiff when he gave the order to insure, and discusses the question whether the ship was then overdue. But this is not the point. What the jury had to consider was, whether the letter would have influenced the underwriter, acting as a reasonable man of business. [They referred to *Duer on Insurance*, vol. ii., pp. 419–427.]

Aspland (Day, Q. C., and Benjamin, Q. C., with him), for the

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plaintiff. — The question whether there was negligence on the part of the captain in not mentioning the loss of the anchor is one for the jury, and one upon which the plaintiff, from the course which the case took at the trial, was not called upon to give evidence. Secondly, there was no misdirection. It is laid down in *Elton v. Larkins*, 5 C. & P. 392, 8 Bing. 198, that, generally speaking, it is not necessary that the assured should communicate the hour at which the vessel sailed, but if the time be such as to make the ship a missing ship, then it becomes material.

[BLACKBURN, J. — If the direction was that the letter could not be material unless the ship was missing, it was inaccurate.]

* The letter did not show the time of sailing, but only [* 511] a delay in loading. [He referred to Arnould on Marine Insurance, 4th ed., vol. i., p. 513.]

BLACKBURN, J. — I think it is impossible to say that the verdict can be entered for the defendants upon the point now taken by them. This point is that, inasmuch as the captain of the *Jessie* did not in his letter to the plaintiff mention the fact that she had lost her anchor in the storm on the 1st of January, and consequently the plaintiff effected his insurance without disclosing this fact, the policy must be taken to be void; for it was a policy, lost or not lost, at and from Mazagan, so that the loss of the anchor was a loss within the policy, and the underwriters ought to have been informed of it. It is admitted that this point was not taken at the trial, but it is contended that the defendants, upon proof of this non-disclosure, are entitled to have the verdict entered in their favour. The cases relied upon are *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, 36 L. J. Q. B. 225, and *Fitzherbert v. Mather*, 1 T. R. 12 (1 R. R. 134), and these cases undoubtedly show that if an agent purposely keeps back information from his principal in order that he may effect an insurance, the principal is responsible for the misrepresentation, and the policy is void. It is unnecessary to say whether these cases must be taken to have decided that where the agent does not act fraudulently, but is only guilty of negligence in not disclosing what he knows, that this will also avoid the policy. But there is also the case of *Gladstone v. King*, 1 M. & S. 35 (14 R. R. 392), where it was held that where the captain, without fraud, neglects to communicate to the owner damage done to the vessel, that this damage is an implied exception out of the policy.

Taking these cases together, it certainly cannot be assumed that

any concealment from the owner by the captain of a damage to the vessel, which might be claimed for as an average loss, would avoid the policy. I must confess that I much prefer the doctrine in Phillips on Insurance, § 564, that in order to avoid the policy, the misrepresentation or concealment by the master must be fraudulent. We certainly cannot enter the verdict for the defendants, as,

if the point had been taken at the trial, several questions [* 512] would * have arisen as to the extent to which the accident was a fact material to be communicated, and as to how far the master was guilty of negligence in not communicating it. Upon another trial, the matter may, if necessary, be investigated.

We come now to the second question, whether there was misdirection, or whether the verdict was against the weight of evidence. I am inclined to think that the rule ought to be made absolute on both grounds. The plaintiff appears to have received a letter from the captain, dated the 9th of January, which reached him on the 24th. This letter was said to have been lost, but the plaintiff gave its contents from memory, and according to him the captain said that he had a fine passage out, that he had commenced loading, but that he had very bad weather, and did not know when he should finish, but that he would write again. Then the plaintiff, on the 24th of February, a month after the receipt of the letter, insures his ship without mentioning the letter.

The question was, whether this letter, and the time which had elapsed since it was received, ought to have been communicated to the underwriter. I think the test is, whether a fair and reasonable underwriter, looking at this letter and the circumstances under which it was received, would say, "I think this is a speculative risk, which I will either decline to take, or, if I do take, it shall be at a greater premium than is usual."

Now, I rather think that what the learned Judge left to the jury was simply the question whether the ship was what is called a "missing ship," so that there was a presumption that she was lost when the insurance was effected. I think this was not the real question. The real question was, whether the contents of the letter, the dates at which it was written and received, and the time which had elapsed since anything had been heard of the vessel, were not facts which might properly have influenced the underwriter in accepting the risk. If, however, the question was in fact left to the jury, then I think that this verdict was so far

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unsatisfactory that there ought to be a new trial. In either view I think the rule for a new trial ought to be made absolute.

LUSH, J. — The first question raised in this case is one of great importance, and upon which there is no authority exactly in point. * It appears that during her stay at Mazagan [* 513] the *Jessie* was driven from her anchorage by a tempest and lost an anchor, and that the master in writing to his owners made no mention of this fact. The ship got back into the roadstead, completed her loading, and started upon her homeward voyage, and in the course of this voyage was lost. The question for our consideration is, are the underwriters liable, or are we bound to say that because the loss of the anchor was not communicated to them, that therefore no claim can be made upon them? The latter proposition is so startling a one that I should be most unwilling to follow it unless I were bound by authority. It would no doubt be obviously unjust to make the underwriters liable for the loss of the anchor, for this was a loss which was not in the contemplation of either the owners or the underwriters, but it is a very different question whether they should not be liable for the subsequent loss of the ship. I quite agree with the authorities which establish that where the master of the ship, or the agent or correspondent of the owner, wilfully or by culpable negligence withholds any fact material to the risk, the owner, in making an insurance, is identified with his agent and liable for his default. But there is the further question, whether, in such a case,* the policy is wholly void or only void *pro tanto*. In the two cases of *Fitzherbert v. Mather*, 1 T. R. 12 (1 R. R. 134), and *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, 36 L. J. Q. B. 225, the claim was for a total loss; and in each case the agent, in order that his principal might in the meantime effect an insurance, wilfully kept back information of the same loss in respect of which the claim was afterwards made. In neither case did the point now before us arise, but in the intermediate case of *Gladstone v. King*, 1 M. & S. 35 (14 R. R. 392), a similar point arose. In that case there was no fraud on the part of the agent, at any rate there was no finding of fraud, but he did not communicate to the owner the particulars of an accident which afterwards resulted in a partial loss of the vessel. The Court held, in an action to recover the amount of this same partial loss, that the cause of the damage not having been communicated, the damage was impliedly excepted from the policy; but they did not hold

the policy to be void, for they recognised the right of the assured to recover back his premium. Now, whether this case [* 514] will hereafter be maintained * or not I cannot say, but it may certainly, I think, be urged that such a claim was not in the contemplation of either party. In the present case no such observation can be made, for the loss of the anchor must have been replaced, and the loss which afterwards occurred was unconnected with the previous loss of the anchor, and was a loss which both parties intended to assure. If the present action had been simply to recover the loss of the anchor, I should have been quite prepared to hold, following *Gladstone v. King*, that the loss was not recoverable under the policy. But I think that as the claim is not in respect of the anchor, but on a distinct and subsequent loss, the policy itself is not void, for there is no evidence of fraud or even of negligence in not mentioning the accident. I think, therefore, that the defendants cannot have the verdict entered in their favour on this point. Upon the other point, I agree with my Brother BLACKBURN that the letter was one which might easily have influenced the underwriter in considering whether he should accept the risk, and the question whether it would so have influenced a reasonable underwriter ought to have been left to the jury. It does not seem to me that the question was placed clearly before them, and I think that the case ought to go down for a new trial.

QUAIN, J. — I am of the same opinion. With regard to the first point, all that we need say is, that it was not taken at the trial. If it had been, it might have been necessary to ask the jury questions as to how far the communication was material, and how far it was the duty of the plaintiff to inform the defendants of it.

With regard to the other point, there is some difficulty in ascertaining what was the exact direction which was given by the learned Judge. But I do not find that the jury were asked to consider whether, under the circumstances, the non-disclosure of the letter was the concealment of a material fact likely to influence the mind of an ordinary underwriter in fixing the premium. The verdict seems to have proceeded on an erroneous ground altogether, namely, whether at the time of the insurance the *Jessie* was an overdue or missing ship. I do not think this can be considered as the test whether the communication was material or not; the question was, whether the letter was part of the circumstances [* 515] relating to the ship which ought to have been

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submitted to the underwriter, that he might take it into account in accepting the insurance and in fixing the premium.

Motion refused, rule absolute for a new trial.

ENGLISH NOTES.

It is thought best to report this case entire, although the decision upon the innocent non-communication by the captain of the partial loss has been adversely criticised in the judgments of the House of Lords in *Blackburn v. Vigors* (H. L. 1887), No. 25, p. 514, *post* (12 App. Cas. 531, 57 L. J. Q. B. 114). But the judgment does not appear open to exception upon the point embodied in the above Rule. The cases will be fully dealt with in the notes to Nos. 23, 24, and 25, p. 526 *et seq.*, *post*.

AMERICAN NOTES.

This case is cited in 1 Beach on Insurance, sect. 442; and he states, at sect. 445: "The rule in marine insurance requires communication to the insurer of any information the applicant for insurance has, which may be material to the risk." (The rule as to original insurance against fire is different, the applicant being bound only to answer questions.) *Gates v. Madison, &c. Ins. Co.*, 1 Selden (New York), 469. Parsons (1 Marine Insurance, p. 469) says in effect that any material concealment is fatal, and there is some question whether the applicant is not bound to diligence in ascertaining material facts which would deter the insurer from issuing the policy. This doctrine is sustained by *Union Ins. Co. v. Stoney*, Harper (South Carolina), 235; *Biays v. Union Ins. Co.*, 1 Washington (U. S. Circ. Ct.), 506; *Neptune Ins. Co. v. Robinson*, 11 Gill & Johnson (Maryland), 256; *Blagge v. N. Y. Ins. Co.*, 1 Caines (N. Y.), 549. In *Hoyt v. Gilman*, 8 Massachusetts, 336, the action was case upon a policy of insurance on the ship *Ariadne* and her freight from Falmouth to her port of discharge in Europe. The defence was concealment of a fact materially affecting the risk. It appeared that the insurance was procured by the son of the plaintiff, acting as his agent; and that at the time it was effected, the plaintiff had in his possession a letter to the effect that insurance on this same risk could not be procured in London, on account of an edict of the French Emperor, confiscating all vessels entering the Jade, to which the *Ariadne* was bound. This information was not communicated either to his agent or to the defendant. The Court held "Whether fraud be a question for the Court or jury, yet if upon the facts in evidence in this case, the jury had given the plaintiff his premium, we should not have hesitated to set aside the verdict. The letter which the plaintiff concealed contained information very material in estimating the risk. The plaintiff must have been aware of this, if he had capacity to enter into a contract. The underwriter had a right to the information. The withholding it from him must be considered fraudulent, and the insurance was therefore void. And, being avoided for such a cause, the plaintiff is not entitled to a return of his premium."

No. 22. — *Stribley v. Imperial Marine Ins. Co.* — Notes.

The question whether the risk was materially increased by a vessel's sailing at a different time from that stated in the application for insurance, should not be left to the jury, where there is no evidence on the subject, or where the statement of time does not amount to a representation. *Allegre's Adm'rs v. Maryland Ins. Co.*, 2 Gill & Johnson (Maryland), 136; 20 Am. Dec. 424.

Misrepresentation as to time when vessel will sail, if material to the risk, is fatal. *Baxter v. N. E. Ins. Co.*, 3 Mason (U. S. Circ. Ct.), 96. Non-disclosure of time when vessel will sail, if it is known to the applicant, and material, will avoid the policy. *Johnson v. Phoenix Ins. Co.*, 1 Washington (U. S. Circ. Ct.), 378.

In *McLanahan v. Universal Ins. Co.*, 1 Peters (U. S. Sup. Ct.), 170, STORY, J., said: "The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss has occurred which, by reasonable diligence, might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud, for under such circumstances the maxim applies, *qui facit per alium facit per se*. His own knowledge, in such a case, infects the act of his agent in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to the disclosure of all material facts which it was in the power of the party to communicate by ordinary means, and the omission is fatal to the insurances. The true principle, deducible from the authorities on this subject, is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated so as to have countermanded the insurance, the policy is void. The doctrine is supported by the English as well as the American authorities, and particularly by *Watson v. Delafield*, 1 Johns. 152, 2 Caines, 224, 2 Johns. 526 (N. Y.), where most of the early cases are collected and commented upon. We do not go over the cases at large, because there is no controversy as to the general rule. The only matter for observation is, whether the rule as to diligence may not, in certain cases, be somewhat more strict, so as to require what, in *Andrews v. Mar. Ins. Co.*, 9 Johns. 32, is called 'extreme diligence,' or what, in *Watson v. Delafield*, is left open for discussion, as extreme diligence — the duty of communication, where the countermand may not only possibly but probably arrive in season. We think however that the principle of the rule requires only due and reasonable diligence to be judged of, and all the cir-

No. 23. — *Carter v. Boehm*, 3 Burr. 1905. — Rule.

cumstances of each particular case, and that the expressions thrown out into the cases above mentioned were not so much intended to point out a stricter rule as to intimate that there might be cases in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port at which the insurance is to be made, and the means of communication, by mail or otherwise, are regular or numerous, or where from the lapse of time, or the date of the order for insurance, the party cannot but feel that every moment's delay adds many chances in favor of the insurance being made before knowledge of the loss. Under such circumstances in proportion as the delay would properly give rise to strong suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence."

No. 23. — *CARTER v. BOEHM*.

(1765.)

No. 24. — *BATES v. HEWITT*.

(1867.)

No. 25. — *BLACKBURN, LOW, & CO. v. VIGORS*.

(H. L. 1887.)

RULE.

It is an implied condition, essential to the liability of the insurer upon a contract of marine insurance, that the assured discloses all the circumstances within his knowledge material to the risk.

For this purpose, the knowledge of the agent effecting the insurance, as also the knowledge of an ordinary agent of the assured (such as the master of the ship) which ought in the course of duty to have been communicated to the assured, is imputed to the assured; but not the knowledge of an agent who has been employed in negotiations for an insurance but who did not effect any insurance.

Carter v. Boehm.

3 Burr. 1905-1919 (1 Smith Lead. Cas.)

Insurance. — Concealment.

What degree of concealment will avoid a policy of insurance.

No. 23. — *Carter v. Boehm*, 3 Burr. 1905, 1906.

This was an insurance cause, upon a policy underwritten by Mr. Charles Boehm, of interest or no interest, without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, Governor George Carter.

[* 1906] * It was tried before Lord MANSFIELD at Guildhall; and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday, the 19th of April last, Mr. Recorder (Eyre), on behalf of the defendant, moved for a new trial.

His objection was, "that circumstances were not sufficiently disclosed."

A rule was made to show cause; and copies of letters and depositions were ordered to be left with Lord MANSFIELD.

N. B. Four other causes depended upon this.

The counsel for the plaintiff, viz. Mr. Morton, Mr. Dunning, and Mr. Wallace, showed cause on Thursday, the first of this month. But first,

Lord MANSFIELD reported the evidence. — That it was an action on a policy of insurance for one year; viz. from 16th of October, 1759, to 16th of October, 1760, for the benefit of the Governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough, in the island of Sumatra, in the East Indies, by its being taken by a foreign enemy. The event happened; the fort was taken by Count D'Estaigue within the year.

The first witness was Cawthorne, the policy-broker, who produced the memorandum given by the governor's brother (the plaintiff) to him; and the use made of these instructions was, to show "that the insurance was made for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides had been long in chancery; and the chancery evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the French: which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother Roger Carter, his trustee, the plaintiff in this cause; the second was from the governor to the East India Company.

* The evidence in reply to this objection consisted of [* 1907] three depositions in chancery, setting forth that the governor had £20,000 in effects, and only insured £10,000; and that he was guilty of no fault in defending the fort.

The first of these depositions was Captain Tryon's, which proved that this was not a fort proper or designed to resist European enemies, but only calculated for defence against the natives of the island of Sumatra; and also that the governor's office is not military, but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his Lordship had made his report, —

The counsel for the plaintiff proceeded to show cause against a new trial.

They argued that there was no such concealment of circumstances (as the weakness of the fort, or the probability of the attack) as would amount to a fraud sufficient to vitiate this contract: all which circumstances were universally known to every merchant upon the exchange of London. And all these circumstances, they said, were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. Dunning laid it down as a rule, "that the insured is only obliged to discover facts; not the ideas or speculations which he may entertain upon such facts."

They said, this insurance was, in reality, no more than a wager, "whether the French would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river, or not."

Sir Fletcher Norton and Mr. Recorder (Eyre) argued, *contra*, for the defendant (the underwriter).

They insisted that the insurer has a right to know as much as the insured himself knows.

They alleged, too, that the broker is the sole agent of the insured.

* These are general, universal principles in all insur- [* 1908] ances.

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that

he did not believe that the insurer would have meddled with the insurance, if he had seen these two letters.

All the circumstances ought to be disclosed.

This wager is not only "whether the fort shall be attacked," but "whether it shall be attacked and taken."

Whatever really increases the risk ought to be disclosed.

Then they entered into the particulars which had been here kept concealed. And they insisted strongly that the plaintiff ought to have discovered the weakness and absolute indefensibility of the fort. In this case, as against the insurer, he was obliged to make such discovery, though he acted for the governor. Indeed, a governor ought not, in point of policy, to be permitted to insure at all; but if he is permitted to insure, or will insure, he ought to disclose all facts.

It cannot be supposed that the insurer would have insured so low as £4 per cent if he had known of these letters.

It is begging the question to say "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose; and the presumption was "that the fort, the powder, the guns, &c., were in a good and proper condition." If they were not (and it is agreed that in fact they were not, and that the governor knew it), it ought to have been disclosed. But if he had disclosed this, he could not have got the insurance. Therefore this was a fraudulent concealment, and the underwriter is not liable.

It does not follow that because he did not insure his whole property, therefore it is good for what he has judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. adv. vult.

[* 1909] * Lord MANSFIELD now delivered the resolution of the Court.

This is a motion for a new trial.

In support of it, the counsel for the defendant contend "that some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy."

The counsel for the plaintiff insist "that the not mentioning these particulars does not amount to a concealment which ought,

in law, to avoid the policy, either as a fraud, or as varying the contract.”

1st. It may be proper to say something, in general, of concealments which avoid a policy.

2ndly. To state particularly the case now under consideration.

3rdly. To examine whether the verdict, which finds this policy good although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk, as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risk run is really different from the risk understood and intended to be run, at the time of the agreement.

The policy would equally be void, against the underwriter, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived; and an action would lie to recover the premium.

* The governing principle is applicable to all contracts [* 1910] and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent as to grounds open to both, to exercise their judgment upon. “*Aliud est celare; aliud, tacere: neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire.*”

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

There are many matters as to which the insured may be innocently silent — he need not mention what the underwriter knows — “*scientia utrinque par pares contrahentes facit.*”

An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge.

The insured need not mention what the underwriter ought to know, what he takes upon himself the knowledge of, or what he waives being informed of.

The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation; as, for instance, the underwriter is bound to know every cause which may occasion natural perils, as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of States; from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their councils, or their want of strength, &c.

If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere, he needs not be told the secret enterprises they are destined [* 1911] *upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two; or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation.

Men argue differently from natural phenomena and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity, and therefore neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose, is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of, and has no reason to suspect.

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The question therefore must always be "whether there was, under all the circumstances at the time the policy was underwritten, a fair representation, or a concealment, fraudulent, if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run."

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss of Fort Marlborough, from being destroyed by, taken by, or surrendered unto, any European enemy, between the 1st of October, 1759, and 1st of October, 1760. It was underwritten on the 9th of May, 1760.

The underwriter knew at the time that the policy was to indemnify, to that amount, Roger Carter, the Governor of Fort Marlborough, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort Marlborough the 22nd of September, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company, which the company offered to put into my hands, but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

* An objection occurred to me at the trial "whether [* 1912] a policy against the loss of Fort Marlborough, for the benefit of the governor, was good," upon the principle which does not allow a sailor to insure his wages.

But considering that this place, though called a fort, was really but a factory or settlement for trade, and that he, though called a governor, was really but a merchant; considering, too, that the law allows the captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share; considering, too, that the objection did not lie, upon any ground of justice, in the mouth of the underwriter, who knew him to be the governor, at the time he took the premium; and as, with regard to principles of public convenience, the case so seldom happens (I never saw one before), any danger from the example is little to be apprehended, — I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially, too, as the objection did not come from the bar.

Though this point was mentioned, it was not insisted upon, at the last trial; nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy; and if it had, we are all of opinion "that we are not warranted to say it is void, upon this account."

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity; where they have had an opportunity to sift everything to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved, without contradiction, that the place called Bencoolen or Fort Marlborough is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an European enemy, but merely for the purpose of trade, and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only security against European ships of war consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots.

That the general state and condition of the said fort, [*1913] and of the strength thereof, was, in general, well * known by most persons conversant or acquainted with Indian affairs, or the state of the company's factories or settlements, and could not be kept secret or concealed from persons who should endeavour by proper inquiry to inform themselves. That there were no apprehensions or intelligence of any attack by the French, until they attacked Natal in February, 1760. That on the 8th of February, 1760, there was no suspicion of any design by the French. That the governor then bought, from the witness, goods to the value of £4000, and had goods to the value of above £20,000, and then dealt for £50,000 and upwards. That on the 1st of April, 1760, the fort was attacked by a French man-of-war of sixty-four guns and a frigate of twenty guns, under the Count D'Estaigne, brought in by Dutch pilots, unavoidably taken, and afterwards delivered to the Dutch, and the prisoners sent to Batavia.

On the part of the defendant, after all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760,

or that there was the least intelligence or alarm “that they might make the attempt,” till the taking of Natal in the year 1760.

They did not offer to disprove the evidence that the governor had acted, as in full security, long after the month of September, 1759, and had turned his money into goods, so late as the 8th of February, 1760. There was no attempt to show that he had not lost by the capture very considerably beyond the value of the insurance.

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September, 1759, which was sent to England by the *Pitt*, Captain Wilson, who arrived in May, 1760, together with the instructions for insuring; and also a letter bearing date the 22nd of September, 1759, sent to the plaintiff by the same conveyance, and at the same time (which letters his Lordship repeated¹).

They relied, too, upon the cross-examination of the broker who negotiated the policy, “that, in his opinion, these * letters ought to have been shown, or the contents dis- [* 1914] closed; and if they had, the policy would not have been underwritten.”

The defendant’s counsel contended at the trial, as they have done upon this motion, “that the policy was void.”

1st. Because the state and condition of the fort, mentioned in the governor’s letter to the East India Company, was not disclosed.

2ndly. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3rdly. That he had not disclosed his having received a letter of the 4th of February, 1759, from which it seemed that the French had a design to take this settlement by surprise the year before.

¹ The former of them notifies to the East India Company that the French had, the preceding year, a design on foot to attempt taking that settlement by surprise, and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being badly supplied with stores, arms, and ammunition; and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is “now more afraid than formerly that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems they had such an intention last year.” And therefore he desires his brother to get an insurance made upon his stock there.

They also contended that the opinion of the broker was almost decisive.

The whole was laid before the jury, who found for the plaintiff.

Thirdly, it remains to consider these objections, and to examine "whether this verdict is well founded."

To this purpose it is necessary to consider the nature of the contract at the time it was entered into.

The policy was signed in May, 1760. The contingency was, "whether Fort Marlborough was or would be taken, by an European enemy, between October, 1759, and October, 1760."

The computation of the risk depended upon the chance "whether any European power would attack the place by sea." If they did, it was incapable of resistance.

The underwriter at London, in May, 1760, could judge much better of the probability of the contingency than Governor Carter could at Fort Marlborough, in September, 1759. He knew the success of the operations of the war in Europe. He knew what naval force the English and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, everything which was known at Fort Marlborough [* 1915] in September, 1759, of the general state of * affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company, and particularly from the governor. He knew what probability there was of the Dutch committing or having committed hostilities.

Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an European power.

If there had been any design on foot, or any enterprise begun, in September, 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter; because, not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an uncertain operation, which might or might not be attempted.

But the governor had no notice of any design subsisting in September, 1759. There was no such design, in fact: the attempt was made without premeditation, from the sudden opportunity of a

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favourable occasion, by the connivance and assistance of the Dutch, which tempted Count D'Estaigne to break his parol.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealment.

The first concealment is, that he did not disclose the condition of the place.

The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it, consistent with his duty. He knew the governor, by insuring, apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote.

By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed, various ways: it was not a matter within the private knowledge of the governor only.

But, not to rely upon that, the utmost which can be contended is that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner as it is taken for granted that a ship insured is seaworthy.

* What is that condition? All the witnesses agree [*1916] "that it was only to resist the natives, and not an European force." The policy insures against a total loss; taking for granted "that if the place was attacked, it would be lost."

The contingency, therefore, which the underwriter has insured against is, "whether the place would be attacked by an European force;" and not, "whether it would be able to resist such an attack if the ships could get up the river."

It was particularly left to the jury to consider "whether this was the contingency in the contemplation of the parties." They have found that it was.

And we are all of opinion "that, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material, only in case of a land attack by the natives.

The second concealment is, his not having disclosed that, from the French not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case: it is mere speculation

of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it, in this case, depended upon the English naval force in those seas, which the underwriter could better judge of at London in May, 1760, than the governor could at Fort Marlborough in September, 1759.

The third concealment is, that he did not disclose the letter from Mr. Winch, of the 4th of February, 1759, mentioning the design of the French the year before.

What the letter was, how he mentioned the design, or upon what authority he mentioned it, or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account Winch wrote to the East India Company, which was objected to, and there-
[* 1917] fore *not read. The nature of that intelligence, therefore, is very doubtful. But taking it in the strongest light, it is a report of a design to surprise the year before, but then dropped.

This is a topic of mere general speculation, which made no part of the fact of the case upon which the insurance was to be made.

It was said, if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud. I agree to it. But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance; because it does not follow that they will cruise this year at the same time in the same place, or that they are in a condition to do it. If the circumstance of "this design laid aside" had been mentioned, it would have tended rather to lessen the risk than increase it; for the design of a surprise which has transpired, and been laid aside, is less likely to be taken up again, especially by a vanquished enemy.

The jury considered the nature of the governor's silence as to these particulars; they thought it innocent, and that omission to mention them did not vary the contract. And we are all of opinion "that, in this respect, they judged extremely right."

There is a silence, not objected to at the trial nor upon this motion, which might with as much reason have been objected to as the last two omissions ; rather more.

It appears by the governor's letter¹ to the plaintiff "that he was principally apprehensive of a Dutch² war." He certainly had, what he thought, good grounds for this apprehension. Count D'Estaigne being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. And probably the loss of the place was owing to the Dutch. The French could not have got up the river without Dutch pilots, and it is plain the whole was concerted with them. And yet at the time of underwriting the policy there was no intimation about the Dutch.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension, is, because it must have arisen from political speculation and general intelligence ;

* therefore, they agree, it is not necessary to communi- [*1918] cate such things to an underwriter.

Lastly, great stress was laid upon the opinion of the broker.

But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is, opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause ; and therefore it is improper and irrelevant in the mouth of a witness.

There is no imputation upon the governor as to any intention of fraud. By the same conveyance which brought his orders to insure, he wrote to the company everything which he knew or suspected ; he desired nothing to be kept a secret which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February, 1760, showed that he thought the danger very improbable.

The reason of the rule against concealments is to prevent fraud and encourage good faith.

If the defendant's objections were to prevail in the present case, the rule would be turned into an instrument of fraud.

The underwriter here knowing the governor to be acquainted

¹ Dated 22nd September, 1759.

Dutch war, I would have it [the insurance]

² His words are : "And in case of a done at any rate."

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with the state of the place, knowing that he apprehended danger, and must have some ground for his apprehension, being told nothing of either, signed this policy without asking a question.

If the objection "that he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be void, — in order to gain if the alternative turned out one way, and to make no satisfaction if it turned out the other: he drew the governor into a false confidence, "that, if the worst should happen, he had provided against total ruin;" knowing, at the same time, "that the indemnity to which the governor trusted was void."

There was not a word said to him of the affairs of India, or the state of the war there, or the condition of Fort Marlborough.

If he thought that omission an objection at the time, he [*1919] ought not to have signed the policy, with a secret *reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now, after the event.

What has often been said of the Statute of Frauds may, with more propriety, be applied to every rule of law drawn from principles of natural equity to prevent fraud, — "that it should never be so turned, construed, or used as to protect or be a means of fraud."

After the fullest deliberation, we are all clear that the verdict is well founded, and there ought not to be a new trial; consequently, that the rule for that purpose ought to be discharged.

Rule discharged.

Bates v. Hewitt.

L. R. 2 Q. B. 595-612 (s. c. 36 L. J. Q. B. 282; 15 W. R. 1172).

[This case is fully reported as No. 75 of "CONTRACT," 6 R. C. 817.]

Blackburn, Low, & Co. v. Vigors.

12 App. Cas. 531-543 (s. c. 57 L. J. Q. B. 114; 57 L. T. 730; 36 W. R. 449).

[531] *Insurance. — Concealment of Material Facts. — Concealment by Agent through whom Policy not effected.*

The plaintiffs instructed a broker to reinsure an overdue ship. Whilst acting for the plaintiffs the broker received information material to the risk, but did not communicate it to them, and the plaintiffs effected a reinsurance for £800

through the broker's London agents. Afterwards the plaintiffs effected a re-insurance for £700, lost or not lost, through another broker. The ship had in fact been lost some days before the plaintiffs tried to reinsure, but neither the plaintiffs nor the last-named broker knew it, and both he and the plaintiffs acted throughout in good faith.

Held, reversing the judgment of the Court of Appeal and restoring the judgment of DAY, J. (17 Q. B. D. 553), that the knowledge of the first broker was not the knowledge of the plaintiffs, and that the plaintiffs were entitled to recover upon the policy for £700.

Appeal from the Court of Appeal.

The facts are stated in the judgments of Lord ESHER, M. R., and LINDLEY, L. J. (17 Q. B. D. 553). The following outline will suffice for this report:—

* The appellants having brought an action against the [* 532] respondent upon a policy of reinsurance subscribed by him for £50, claiming for a total loss by perils of the sea, the substantial defence was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs or their agents and unknown to the defendant.

At the trial before DAY, J., and a special jury in July, 1885, the following facts were proved or admitted:—

The plaintiffs, underwriters and insurance brokers at Glasgow, had underwritten the steamship *State of Florida* for £1500, the policy having been effected by the usual brokers for the ship, Rose, Murison, & Thomson, who were underwriters and insurance brokers in Glasgow. The ship had left New York on the 11th of April, 1884, bound for Glasgow, where she was due about the 24th or 25th. On the 30th the plaintiffs tried to reinsure through their London brokers, Roxburgh, Currie, & Co., but the terms asked were higher than the plaintiffs would give. On the next day, May 1st, the plaintiffs asked Rose, Murison, & Thomson to effect a reinsurance for £1500 at fifteen guineas through Rose, Thomson, Young, & Co., the London agents of Rose, Murison, & Thomson. The latter telegraphed accordingly to Rose, Thomson, Young, & Co. After the telegram and before any answer came, Murison, a member of the firm of Rose, Murison, & Thomson, became aware of certain facts concerning the ship which were material to the risk, but these facts were never communicated to the plaintiffs or to Roxburgh, Currie, & Co. After learning these facts, Rose, Murison, &

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Thomson received the following answer to their telegram : "Twenty guineas paying freely and market very stiff; likely to advance before day is out." This answer they showed to the plaintiffs, and then sent in the plaintiffs' names the following telegram to Rose, Thomson, Young, & Co. : "Pay 20 guineas." The answer to this was sent direct to the plaintiffs, who ultimately reinsured for £800 at 25 guineas through Rose, Thomson, Young, & Co. This was not the policy sued on.

On the 2nd of May the plaintiffs, through Roxburgh, Currie, & Co., effected a policy of reinsurance for £700 at 30 guineas lost or not lost. This was the policy sued on. The ship had in [* 533] fact * been lost some days before the plaintiffs tried to reinsure. It was admitted that the plaintiffs and Roxburgh, Currie, & Co. acted in good faith throughout.

The jury having been discharged by consent, DAY, J., gave judgment for the plaintiffs for the amount claimed.

The Court of Appeal (LINDLEY and LOPES, L.JJ., Lord ESHER, M. R., dissenting) reversed this decision and gave judgment for the defendant.

Against this judgment the plaintiffs appealed.

April 28, 29. Sir C. Russell, Q. C., and Hollams for the appellants : —

The decision of the Court of Appeal was wrong, because the material information was not known either to the plaintiffs or to any one who was their agent to effect the insurance in question, or whose knowledge was the knowledge of the principal. The knowledge of Rose, Murison, & Thomson was not the knowledge of the plaintiffs so far as the insurance in question was concerned. Concealment of a material fact by the agent through whom the policy is effected avoids the policy, and so will concealment by some other agents; but no case decides that concealment by every agent avoids. The agent must be the master of the ship, or the agent at the port where she is, or in a similar position. He must be in control of and in direct relation to the subject-matter: the *alter ego* of the principal; an "habitual," a "general" agent; — expressions used in the various authorities. Here the agent was not the "habitual" or "general" agent, and he did not effect the policy. To sustain the judgment the respondent must contend that the broker is bound to send his principal every rumour he hears, for which proposition there is no authority. The cases of

Fitzherbert v. Mather, 1 T. R. 12 (1 R. R. 134), *Gladstone v. King*, 1 M. & S. 35 (14 R. R. 392), and *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, 36 L. J. Q. B. 225, are discussed and exposed in the judgment of Lord ESHER (17 Q. B. D. 553). If their effect is what was supposed by the Court of Appeal, they are contrary to principle, and may be overruled in this House. *Stribley v. Imperial Marine Insurance Company*, 1 Q. B. D. 507 (p. 491, *ante*), only followed *Gladstone v. * King*. Whether the decision [* 534] of STORY, J., or of the Court in *Error* was the right one in *Ruggles v. General Interest Insurance Company*, 4 Mason, 74; in *error*, 12 Wheaton, 408, the case does not throw much light on the present point. The question is also discussed in 1 Phillips, Ins., ss. 531, 543, and in 2 Duer, Mar. Ins., Lect. 13, Part 1, ss. 23–32, pp. 413, 427.

Sir R. Webster, A. G., and J. Gorell Barnes for the respondent: —

It is a condition of the contract of insurance that there is no misrepresentation or concealment either by the assured or any one who ought, as a matter of business or fair dealing, to have disclosed the material facts. The plaintiffs having been left in ignorance of the material facts by their agents whose duty it was to inform them, cannot take advantage of a concealment without which the insurance could not have been effected. The material facts became known to Rose, Murison, & Thomson while acting as the plaintiffs' agents to reinsure their whole line. Murison went on acting as the plaintiff's agent after he knew those facts; and so long as an agent acts, he is bound to communicate material facts to his principal. On what ground is the policy for £800 different from that for £700? A distinction is attempted to be drawn between a risk sought to be covered and one not sought to be covered, but the risk was indivisible, though split up into different policies. No part of the risk was insured when Murison knew the facts. He by his London agents did effect an insurance on part on May 1, which was vitiated by his knowledge. How can the principal validly insure the remainder the next day? To vitiate the contract fraud is not necessary; whether the misrepresentation or concealment be the result of ignorance, mistake, or misadventure, whether it be intentional or accidental, the result is the same. 2 Duer, Mar. Ins., Lect. 13, Part 1, ss. 3, 23, pp. 381, 415; 1 Phillips, Ins., ss. 543, 549, 562, 564; 1 Arnould, Mar. Ins. (4th ed.), pp. 481, 490. The duty to communicate is equally

binding whether the agent be the habitual or general agent or not. Where two innocent persons contract, the loss must fall on him who trusted the person who knew the truth. [They also discussed at length the above cases, and Lord MACNAGHTEN [* 535] * referred to *Wyllie v. Pollen*, 32 L. J. Ch. 782, per Lord WESTBURY, on the subject of constructive notice to a principal.]

Hollams, for the appellants, in reply cited 2 Duer, Mar. Ins., p. 788.

The House took time for consideration.

August 9. LORD HALSBURY, L. C. : —

My Lords, in this case the plaintiffs sue upon a policy of marine insurance, and the only question arises upon the statement of defence that the defendant was induced to enter into the contract by concealment of material facts by the plaintiffs and their agents.

The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact the concealment or non-disclosure of which is relied on as vitiating the policy; but an agent, who did not effect the policy, at an earlier period received information, admitted to be material, while he was acting as agent to effect an insurance for the plaintiffs, which he did not communicate.

DAY, J., before whom the case was decided without a jury, held that this did not affect the validity of the policy. A majority of the Court of Appeal reversed DAY, J.'s judgment, and held that the non-disclosure was fatal to the plaintiffs' claim.

So far as I can understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested, but it applies that principle to a state of facts to which I think it is inapplicable. LINDLEY, L. J., says, I think correctly: "It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by any one who ought as a matter of business and fair dealing to have stated or disclosed the facts to him, or to *the* underwriter for him (17 Q. B. D. 578)." And LOPES, L. J., after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it to mean that the principal is to be as responsible for any knowledge of a material fact acquired [* 536] by his *agent employed to obtain the insurance as if he

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had acquired it himself (17 Q. B. D. 579). To the propositions thus stated I think no objection could be made; but it is obvious that the words in the one judgment “agent employed to obtain the insurance,” or in the other judgment the words “the underwriter,” import that the particular contract obtained was, in the language of the statement of defence, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents of certain facts then known to the plaintiffs or their agents, and unknown to the defendant, and which were material to the risk.

I doubt very much whether the solution of the controversy as to what is the true principle upon which the contract of insurance is avoided by concealment or misrepresentation, whether by considering it fraudulent or as an implied term of the contract, helps one very much in deciding the present case. If one were to adopt in terms the language of Lord Ellenborough in *Gladstone v. King*, 1 M. & S. 35 (14 R. R. 392), I do not think it could justify the judgment of the majority of the Court of Appeal. In that case a policy lost or not lost was effected on the 25th of October. On the previous 25th of July the ship had run upon a rock. On the 5th of August the captain wrote to his owners, the plaintiffs; they received his letter on the 5th of October. Whatever may be said of the logic of that case, which acquitted the captain of all ill intention, but decided upon the ground that otherwise owners might direct their captains to remain silent, and which upon a policy lost or not lost assumes any antecedent damage to have been an implied exception out of the policy, it does not proceed upon any such ground as the Court of Appeal appear to rely on here. Lord ELLENBOROUGH says: “No mischief will ensue” (a somewhat strange mode of enunciating a proposition of law) “from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience.” Unfortunately his Lordship does not state what is the principle which he apparently admits to be new. I can quite understand that when a man comes for an insurance upon his ship he may be expected to know * both the then condition and the history of the [*537] ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such

as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history because he has committed to others — his captain, or his general agent for the management of his shipping business — the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship.

With respect to agency so limited, I am not disposed to differ with the proposition laid down by COCKBURN, C. J., in *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, 521, 36 L. J. Q. B. 225. A part of the proposition is “that the insurer is entitled to assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge.” I think these last are the cardinal words, and contemplate such an agency as I have described above. I am unable, however, to see that the present case is governed by any such principle.

A broker is employed to effect a particular insurance. While so employed he receives material information. He does not effect the insurance and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an insurance? I am unable to accept the criticism by the MASTER OF THE ROLLS upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself and the broker through whom the policy sued on was effected were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word “agent” leads to con-

fusion. Some agents so far represent the principal that in [* 538] all * respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent’s knowledge or intentions are the knowledge or intentions of his principal; and whether his

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acts are the acts of his principal depends upon the specific authority he has received.

In *Fitzherbert v. Mather*, 1 T. R. 12 (1 R. R. 134), the consignor and shipper of the goods insured was the agent whose knowledge was in question. In *Gladstone v. King*, 1 M. & S. 35 (14 R. R. 392), the master of the ship was the agent; and in *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, 36 L. J. Q. B. 225, the agent was the accepted representative of the principal, in effect trading and acting for him in Smyrna, the owner himself carrying on business in Manchester. And though the decision in *Ruggles v. General Insurance Co.*, 12 Wheaton, 408, before the Supreme Court of the United States, may not be very satisfactory in what they held under the circumstances of that case to be the relation between the captain of the ship and his owners, the principle upon which that case was decided was the supposed termination of the agency between them.

Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is, I think, correct; but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application.

To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition.

What, then, is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal?

* He certainly is not employed to acquire such knowl- [* 539] edge, nor can any insurer suppose that he has knowledge in the ordinary course of employment, like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case the knowledge was acquired, not because he was the agent of the assured, but from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to

effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency — he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge.

For these reasons, I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of DAY, J., restored; and I move your Lordships accordingly.

LORD WATSON: —

My Lords, this is a case of considerable nicety; but I have ultimately come to the conclusion, for the reasons already stated by the LORD CHANCELLOR, that the appeal ought to be allowed.

It is, in my opinion, a condition precedent of every contract of marine insurance that the insured shall make a full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made. Where an insurance is effected through the medium of an agent, the ordinary rule of law applies, and non-disclosure of material facts, known to the agent only, will affect his principal, and give the insurer good ground for avoiding the contract.

In the case of insurance by a shipowner, it has been [*540] decided * that he is affected by the knowledge of a class of agents other than those whom he employs to insure. In the ordinary course of business, the owner of a trading vessel employs a master and ship-agents, whose special function it is to keep their employer duly informed of all casualties encountered by his ship, which would materially influence the judgment of an insurer. On that ground it has been ruled that the insurer must be held to have transacted in reliance upon the well-known usage of the shipping trade, and that he is consequently entitled to assume that every circumstance material to the risk insured has been communicated to him, which ought in due course to have been made known to the shipowner before the insurance was effected. Ac-

cordingly if a master or ship-agent, whether wilfully or unintentionally, fail in their duty to their employer, their suppression of a material fact will, notwithstanding his ignorance of the fact, vitiate his contract.

I do not think it necessary to notice in detail the authorities which bear on this point. I desire to say, however, that I have difficulty in comprehending the principle upon which the Court in *Gladstone v. King*, 1 M. & S. 35 (14 R. R. 392), and *Stribley v. Imperial Marine Insurance Company*, 1 Q. B. D. 507 (p. 491, *ante*), held that the innocent non-communication of a material fact by an agent who was the *alter ego* of the shipowner merely created an exception from the policy. In both these cases the Court appears to me to have undertaken the somewhat perilous task of settling the terms of the contract which the insurer would have made for himself if the fact had been communicated to him.

In the present case it is sought to extend the imputed knowledge of the insured to all facts which during the period of his employment became known to any agent, other than the agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy. This is a case of reinsurance; but it is obvious that the principle, if admitted, would be equally applicable to the original contract.

I am of opinion, with your Lordships, that the responsibility of an innocent insured for the non-communication of facts which * happen to be within the private knowledge of [*541] persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship-agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. There is also, as the MASTER OF THE ROLLS pointed out, an important difference in the positions of these two classes

with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principal. So, also, when an agent to insure is brought into contract with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not; but it cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing.

In the circumstances of this case I have come to the conclusion that whilst it might be the moral duty of Mr. Murison to communicate to the appellants the information which he received on the forenoon of the 1st of May, 1884, he was under no legal obligation to do so. There may be circumstances which impose upon agents in the position of Mr. Murison an express or implied duty to communicate their own information to their principal; but nothing of that sort occurs here. I must in fairness to Mr. Murison say that I can find no warrant for the inference of fact drawn by LINDLEY, L. J., that he purposely omitted to impart his knowledge to the appellants, in order that they might reinsure on more favourable terms. No such imputation was made at [* 542] the *trial; and if it had been made, it ought to have been submitted to the jury, and their verdict taken upon it.

I concur therefore in the judgment which has been moved.

LORD FITZGERALD: —

My Lords, in this very interesting case I concur in the order which will presently be proposed by my noble and learned friend the LORD CHANCELLOR. I adopt entirely the reasons which have been given by the LORD CHANCELLOR and by my noble and learned friend opposite (LORD WATSON). The judgment delivered by the MASTER OF THE ROLLS was one of more than usual ability — it was a considered judgment, prepared with care and upon a critical examination of the authorities; and I am prepared to adopt that judgment, and substantially the reasons given by the noble and learned Lord for the conclusion at which he arrived, though not every portion of those reasons.

LORD MACNAGHTEN: —

My Lords, I agree.

It has frequently been said by eminent Judges that the doctrine of constructive notice ought not to be extended. It seems to me that the decision under appeal involves a great and a dangerous extension of that doctrine.

There is nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent to whom the management of that property is committed possessed at the time and might in the ordinary course of things have communicated to his employer. In such a case it may be said without impropriety that the knowledge of the agent is the knowledge of the principal. But the case is different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal looks for information, but an agent employed for the special purpose of effecting the insurance. It is quite true that the insurance would be vitiated by concealment on the part of such an agent, just as it would be by concealment on the part of the principal.

But that is not because the knowledge of the agent * is [* 543] to be imputed to the principal, but because the agent of the assured is bound, as the principal is bound, to communicate to the underwriters all material facts within his knowledge. Concealment of those facts is a breach of duty on his part to those with whom his principal has placed him in communication. *Lynch v. Dunsford*, 14 East, 494 (13 R. R. 295).

It was argued that in the present case Murison was under a legal obligation to communicate to the appellants the knowledge which he acquired while employed as their agent. But the learned counsel for the respondent produced no authority for that proposition, nor did they, I think, satisfy your Lordships that such an obligation flowed from Murison's employment. The majority of the Court of Appeal say that whether there was a legal obligation on the part of Murison or not, there was a moral obligation on his part to communicate this information to his employers. But I apprehend that it is not the function of a Court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. Whatever may be thought of Murison's conduct from a moral point of view, it would, in my opinion, be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not wilfully shut their eyes or

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closed their ears to any means of information, are to be affected with the knowledge of matters which other persons may be morally though not legally bound to communicate to them.

Order appealed from reversed; judgment of Day, J., restored; respondent to pay to the appellants the costs both here and below; cause remitted to the Queen's Bench Division.

Lords' Journals, 9th August, 1887.

ENGLISH NOTES.

A positive statement of a material fact made by the plaintiff's insurance broker at the time of the contract, where the statement was untrue in point of fact, has been held ground for avoiding the insurance, although the statement was made *bonâ fide* and grounded upon a mistaken interpretation of, and inference from, information given by a stranger. *Macdowall v. Fraser* (1779) 1 Dougl. 259.

And even a positive statement of an event in the future which is within the control of the agents of the insured — and where the statement is falsified by the actual event — has been held to have the same effect in this respect as a misrepresentation of fact. *Dennistoun v. Lillie* (1821), 3 Bligh, 202, 22 R. R. 13 (see p. 534, *post*).

There has never been any doubt that the misstatement or non-disclosure by the insured of a material fact actually known to him avoids the contract. The only question in such a case is whether the fact is material to the risk. In *Bridges v. Hunter* (1813), 1 M. & S. 15, 14 R. R. 380, the claim of the insured was disallowed by reason of the non-disclosure of letters from which it might have been inferred that the ship intended to sail with a certain convoy. This convoy had arrived, and the list of ships arriving with her, which did not include the ship in question had been published at Lloyd's. The non-disclosure was held material, because the facts, if known, might have suggested that she was a missing ship. In *Kirby v. Smith* (1818), 1 B. & Ald. 672, 19 R. R. 412, the owner of a ship sailing home from Elsinour, had come home by another ship which started six hours later, and encountered rough weather. He insured the former ship without mentioning these facts. It was held that the circumstances were material, and that he could not recover on the policy.

Where there is a positive statement made to the underwriter as to a material fact, — for instance, the time of a vessel sailing, — the underwriter is entitled to rely upon it, and if it is untrue, to avoid the policy, although at the time of the contract he had access to a public source of true information, in the list at Lloyd's. *Macintosh v. Marshall* (1843), 11 M. & W. 116, 12 L. J. Ex. 337.

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Where there is intentional deception on the part of the insured as to a matter which forms part of the inducement upon which the insurer acts in making the contract, — that is to say, where the contract is induced by fraud, properly so called, — the insurance may, like any other contract, be avoided, whether the misrepresentation was of a fact material to the risk or not. *Sibbald v. Hill* (H. L. 1814), 2 Dow, 263, 14 R. R. 160.

The case of *Fitzherbert v. Mather* (1785), 1 T. R. 12, 1 R. R. 134, which has been referred to in some of the judgments in the principal case of *Blackburn v. Vigors* (pp. 517, 521, *supra*), as well as in *Stribley v. Imperial Marine Insurance Co.*, No. 22 (p. 494, *supra*), was briefly as follows: —

The plaintiff, by an agent, contracted for the purchase of oats to be shipped on the plaintiff's account, and the agent directed Thomas to send him (the agent) a bill of lading and invoice of the oats, and to send a like bill of lading and invoice to the plaintiff at Cuthbert Fisher's, Esq., London. Thomas accordingly shipped the oats. He wrote to the plaintiff's agent advising the shipment, and saying: "I have sent a bill of lading and advice to Mr. Fisher, that he may insure if he likes, as the equinox is near," &c. Thomas had in fact written to Fisher advising the shipment, and saying, "I wish the whole safe to hand. . . . The weather appears stormy." The letters were not, however, despatched until the following day after Thomas had received information that the ship was lost. The letter to Fisher was received by him by the same post as a letter from the plaintiff directing Fisher to insure the oats on receipt of advice of the shipment. All the members of the Court, Lord MANSFIELD, Ch. J., WILLES, J., ASHHURST, J., and BULLER, J., considered it clear that Thomas was the plaintiff's agent, and that the insurance was made on his misrepresentation, and was accordingly void. Lord MANSFIELD, Ch. J., said: "This policy was effected by misrepresentation, and that misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void." BULLER, J., observed that Thomas's letter was the foundation of the insurance; and continued: "Though the plaintiff be innocent, yet if he builds his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit? Here it appears that the plaintiff trusted Thomas; and he must therefore take the consequences."

In *Lynch v. Dunsford* (in error, 1811), 14 East, 494, 13 R. R. 295,

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an insurance had been effected on goods on board ship or ships from Canary Islands to London. At the time of effecting the insurance the agent who effected it on the part of the insured knew that one of these ships was *The President*, and at the same time there was a communication stuck up at Lloyd's that a certain ship had fallen in with *The President* "deep and leaky." *The President* was lost by capture, and it turned out that the intelligence as to her being met with "deep and leaky" was false. Nevertheless the Court held that the knowledge of the agent that some of the goods were on board *The President* was knowledge of a material fact, and that the policy was void.

In *Gladstone v. King* (1813), 1 M. & S. 392, 14 R. R. 392, the ship, which was insured lost or not lost, had been driven from her moorings in a storm and struck upon a rock, but was got off without apparent damage. The captain, in a subsequent letter to his owners, which reached them before effecting the insurance, had made no mention of the occurrence. It turned out that the ship had by this accident suffered considerable damage, and this was the loss sought to be recovered in the action. The Court held that the plaintiff was not entitled to recover either the average loss, or a return of the premium. It is clear from Lord ELLENBOROUGH's opinion that he thought there was wilful concealment on the part of the captain of a damage which he at least suspected. Yet he puts the decision as to non-return of the premium on the ground that it was not the case of a void insurance, but of an exception out of the policy; a proposition which is certainly open to the criticism of Lord HALSBURY and Lord WATSON in *Blackburn v. Vigors* (pp. 519, 523, *supra*).

In the case of *Rickards v. Murdock* (1830), 10 B. & C. 527, the owner of goods shipped on board a vessel called the *Cumberland*, wrote to agents in London a letter giving an order to insure, and sent this letter by another ship called the *Australia*, which sailed about a month later. It appeared from the letter, and from a direction on the cover of it, that the letter was only to be delivered to the agent in case of the non-arrival of a Mr. Emmet, who was sailing by the *Cumberland* in charge of the goods in question; and the letter contained this passage: "To give every chance for Mr. Emmet's arrival in England, I have directed my friend Mr. Harris not to deliver this until thirty days after the arrival of the *Australia* in London." Mr. Harris accordingly kept the letter for thirty days after the arrival of the *Australia*, and then delivered it to the London agents. They accordingly effected an insurance with an insurance company after reading to the manager a part of the letter expressly directing the insurance; but not communicating the passage above quoted, or the fact that the delivery of the letter had been delayed. A jury found for the defend-

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ants. The Court, by a judgment delivered by Lord TENTERDEN, held that the letter was material and ought to have been communicated; and the defendants maintained their verdict.

In the last-mentioned case evidence had been admitted of the opinion of underwriters that the communication was material. And by the judgment delivered by Lord TENTERDEN, it appears to have been considered that this was properly admitted. The question as to whether it was proper to submit this evidence to a jury came up again in another case arising out of the same facts; and the Court, considering that it ought not to have been admitted, made absolute a rule for a new trial. *Campbell v. Rickards* (1833), 5 B. & Ad. 840.

In *Proudfoot v. Montefiore* (1867), L. R. 2 Q. B. 511, 36 L. J. Q. B. 225, 16 L. T. 585, 15 W. R. 920, the plaintiff, a merchant in Liverpool, insured goods which had been shipped at Smyrna, "lost or not lost." At the time of signing the slip, the ship had been stranded, and the cargo materially damaged and in danger of being totally lost. This was known to the plaintiff's general agent at Smyrna, who had written to the plaintiff advising the loss, but purposely omitted to telegraph, in order that the plaintiff might insure. The plaintiff, at the time of signing the slip, was in ignorance of the circumstance. The Court held that it was the agent's duty to have telegraphed, and that the plaintiff could not recover on the policy. The judgment of the Court, delivered by COCKBURN, Ch. J., after citing the cases of *Fitzherbert v. Mather* (particularly the judgment of BULLER, J., cited p. 527, *ante*), and *Gladstone v. King*, p. 528, *ante*, and a contrary ruling of the late Mr. Justice STORY, proceeded as follows: "Notwithstanding the dissent of so eminent a jurist as Mr. Justice STORY, we are of opinion that the cases of *Fitzherbert v. Mather* and *Gladstone v. King* were well decided, and that if an agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any facts material to be communicated to the underwriters, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation."

In the case of *Blackburn, Low, & Co. v. Haslam* (1888), 21 Q. B. D. 144, 57 L. J. Q. B. 479, 59 L. T. 407, 36 W. R. 855, the insurance of an overdue ship was effected by a sub-agent upon the order of an agent who was immediately instructed by the insured. The agent had confidential information that the ship was wrecked, but did not disclose the information either to the principal or to the sub-agent. It was held that the insured could not recover.

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AMERICAN NOTES.

The doctrine as to duty of one effecting a marine insurance to disclose all material facts to the insurer has been anticipated in the last note (*ante*, p. 499), and the American doctrine is there sufficiently stated.

The first two principal cases are cited in *Parsons on Marine Insurance*; in 1 May on Insurance, sect. 207; in 1 Biddle on Insurance, sect. 541; and all three in 1 Beach on Insurance, sect. 443. The last case is very largely quoted from by Beach. It is also cited in 14 Am. & Eng. Enc. of Law, p. 350. The first case is cited in *Boggs v. Am. Ins. Co.*, 30 Missouri, 63, citing Duer's opinion that "the question is not whether the loss that is claimed is attributable in any degree to the risks that were conceded; but whether, had the facts been known, the underwriter would have subscribed the policy or would have limited himself to the premium that he received." That was a case of fire insurance, and the Court said that "a more rigid rule obtains in marine insurances" than that prevailing in fire insurances; namely, that the applicant is not bound to disclose matters not inquired into unless known to him, and unknown to the insurer, and as to which the latter is not bound to inform himself.

In *Rosenheim v. Am. Ins. Co.*, 33 Missouri, 230, it was held to have been properly left to the jury to say whether the fact that the vessel was known to the owner to be aground and in danger was material.

Concealment of knowledge of the loss of the vessel clearly avoids the policy. *Ins. Co. v. Lyman*, 15 Wallace (U. S. Sup. Ct.), 664, even though it was insured "lost or not lost."

The insured is bound to communicate every fact within the knowledge of himself or of his agents, whose duty it is to inform him, and who have had opportunity to do so, which would lead a reasonable underwriter to refuse the risk or demand a higher premium. As for example, peril from a severe storm: *Moses v. Delaware Ins. Co.*, 1 Washington (U. S. Circ. Ct.), 385; *Ely v. Hallett*, 2 Caines (N. Y.), 57; facts subjecting the vessel to seizure: *Archibald v. Merc. Ins. Co.*, 3 Pickering (Mass.), 70; *Stocker v. Merrimack M. & F. Ins. Co.*, 6 Massachusetts, 220; the fact that a belligerent was interested: *Buck v. Chesapeake Ins. Co.*, 1 Peters (U. S. Sup. Ct.), 151.

Not to disclose the time of the arrival of a vessel, when asked, is a material concealment, although the arrival had been mentioned in the newspapers, and was known to one of the directors of the insurance company. *Himely v. So. Car. Ins. Co.*, 1 Mill (So. Car.), 153; 12 Am. Dec. 623. If the insured undertakes fully to state all the circumstances which can affect the risk, he must do so fully and fairly, and cannot excuse himself for not communicating a material fact on the ground that it was already known to the insurer. *Stoney v. Union Ins. Co.*, 3 McCord (So. Car.), 387; 15 Am. Dec. 634.

The applicant is not bound to communicate facts from which a capture and condemnation in violation of the law of nations may be apprehended, unless they are such as to create so general an impression of danger as would enhance the premium. *Marsh v. Muir*, 1 Brevard (So. Car.), 134; 2 Am. Dec. 648.

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The assured is bound to disclose the fact that the cargo is live stock when that is the fact. *Allegre's Adm'rs v. Maryland Ins. Co.*, 8 Gill & Johnson (Maryland), 190; 29 Am. Dec. 536. If goods are shipped on deck, that must be disclosed. *Smith v. Miss., &c. Co.*, 11 Louisiana, 142; 30 Am. Dec. 714. So where a vessel is insured as American, and is furnished with American papers, but is really owned by Spanish subjects. *Price v. De Peau*, 1 Brevard (So. Car.), 452; 2 Am. Dec. 680.

Knowledge of a loss happening before insurance, by an agent of the owner, for any purpose connected with the procuring of the insurance, is attributable to the owner. *General Int. Ins. Co. v. Ruggles*, 12 Wheaton (U. S. Sup. Ct.), 408; *Byrnes v. Alexander*, 1 Brevard (So. Car.), 213. But not unless the agency was connected with the effecting of the insurance. *Clement v. Phoenix Ins. Co.*, 6 Blatchford (U. S. Sup. Ct.), 481, citing *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, "where the subject-matter of the agency becomes extinct, it is not easy to understand how in any just sense the agency can be said to survive." *General Int. Ins. Co. v. Ruggles*, *supra*. And so in that case, the loss of the vessel having been purposely concealed from the owner by the master, after the insurance had been effected, and the owner having acted in good faith, the insurance was held binding.

Knowledge by an insurance broker is attributable to his principal. *Hambel v. City Ins. Co.*, 36 Federal Reporter, 118.

The assured is not chargeable with notice contained in letters not yet taken from the post or read. *Neptune Ins. Co. v. Robinson*, 11 Gill & Johnson (Maryland), 256; *Green v. Merch. Ins. Co.*, 10 Pickering (Mass.), 402. And in *Snow v. Mercantile M. Ins. Co.*, 61 New York, 160, it was held, where insurance was ordered in 1866, from Liverpool on a vessel at New York, and the owner learned of her loss in season to countermand it by ocean telegraph, he was not bound to use that extraordinary means unless it "was at that time a usual means of mercantile communication." Citing *McLanahan v. Universal Ins. Co.*, 1 Peters (U. S. Sup. Ct.), 170. (Two Judges dissented.)

A very full and useful list of authorities to the doctrine of the first branch of the Rule may be found in 14 Am. & Eng. Enc. of Law, p. 354.

No. 26. — BARBER v. FLETCHER.

(1779.)

No. 27. — BOWDEN v. VAUGHAN.

(K. B. 1809.)

RULE.

THE mere statement of a belief or expectation which is not borne out by the event, is not, unless made *malâ fide* by a person who entertains no such belief or expectation,

No. 26. — *Barber v. Fletcher*, 1 Dougl. 305, 306.

a representation such as to avoid the policy; and a statement as to a future event made by a person who has obviously no control over the event, is regarded as a mere statement of an expectation.

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1 Dougl. 305, 306.

Insurance. — Expected to Sail. — No Representation of Fact.

[305] A representation made to the first underwriter extends to all the others. A representation that the ship is expected to sail from the coast of Africa on such a day is not material so as to vitiate the policy, although it should turn out that she actually sailed six months before.

[306] On a motion, after verdict for the plaintiff, in an action on a policy, it appeared by the affidavit of Shulbred, the first underwriter on the policy, that, when he signed the policy, in March, 1778, the broker was getting several others, on other ships, subscribed at the same time, all belonging to the same owner, and said, speaking of them all, "Which vessels are expected to leave the coast of Africa in November or December, 1777." In truth, the vessel in question had sailed in May, 1777, and Shulbred swore, in his affidavit, that, if he had known that circumstance, he would not have signed. There had been actions brought against all the underwriters on the policy except Shulbred.

Davenport, for the defendant, insisted that a representation to the first underwriter is considered as made to all who sign after him; and that the representation here was material, or at least such as ought to be submitted to a jury, for them to judge of its materiality.

LORD MANSFIELD. — It has certainly been determined, in a variety of cases, that a representation to the first underwriter extends to the others. . . . But the representation is not material. It was only an expectation, and the underwriters did not inquire into the ground of the expectation. This was lying by till after a trial, in order to make an objection if the verdict should be for the plaintiff.

The rule discharged.

No. 27. — Bowden v. Vaughan, 10 East, 415, 416.

Bowden v. Vaughan.

10 East, 415, 416 (10 R. R. 340).

Insurance. — Probable Expectation. — Not Representation.

A representation to the underwriters at the time of effecting a policy by [415] the owner of goods on board a ship, as to the time of her sailing, being made *bonâ fide* upon the probable expectation, does not conclude him.

This was an action upon a policy of insurance on goods at and from Lisbon to London. Previous to the effecting of the insurance a letter had been received by the plaintiff from his correspondent, dated Lisbon, 27th of October, 1807, in which the writer advises him that he had consigned to him 1828 hides by the *Almirante Nelson*, which were to be insured; stating that she was a Portuguese ship, and would sail in a few days. This letter was not shown to the underwriters at the time of subscribing the policy; but the broker represented that the ship was to sail in a few days: and he said upon his examination at the trial at Guildhall, that if it had been represented that the ship was not to sail in less than a month, the insurance could not have been effected; the French army marching to the attack of Portugal being then daily expected at Lisbon. There was no doubt, therefore, of the materiality of the representation; and in fact the vessel did not sail till the 29th of November, and was stopped by the enemy on the 30th before she left the Tagus. Lord ELLENBOROUGH, Ch. J., left the case to the jury, advising them to consider that the person by whom the representation was made was the owner of goods, who could only speak of the sailing of the vessel from probable expectation; and that if such representation were made *bonâ fide*, it should not conclude him. And the jury, being of opinion that the *representation had been made *bonâ fide* [*416] on probable expectation, found a verdict for the plaintiff.

Park now moved for a new trial, on the ground that no such distinction appeared in any of the cases, between a representation as to the time of sailing made by the owner of the goods, and one made by the shipowner; and that the effect of it with respect to the underwriter was the same, whether it proceeded from the one or the other. But

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The Court were of the same opinion with the LORD CHIEF JUSTICE at the trial, that a representation as to the time of the ship's sailing, made by the owner of goods on board, must from the nature of the thing be considered only as a probable expectation, he having no control over the event. *Rule refused.*

ENGLISH NOTES.

It has already been noted (p. 526, *supra*) that a positive statement of an event in the future which is within the control of the agents of the insured has the same effect as a representation of fact. *Dennistoun v. Lillie* (1821), 3 Bligh, 202, 22 R. R. 13. The case is somewhat anomalous. The statement, not being introduced into the contract itself, cannot be a warranty (see *Stribley v. Imperial Marine Insurance Co.*, No. 22, p. 491, *ante*). And it is not, strictly speaking, a representation of fact. *Dennistoun v. Lillie* was a Scotch case which came on appeal to the House of Lords. The insurance was effected by merchants in Glasgow, who received a letter of advice from their correspondents at New Providence, dated April 2, 1814, saying (*inter alia*): "The *Brilliant* will sail on the 1st of May, a running vessel, in which the writer of this will take his passage." The insurance was effected (of the ship *Brilliant* and cargo) on the 18th of June upon showing this letter and an enclosed letter from the same correspondents, dated 19th March, which stated that the *Brilliant* was a fast vessel, mounting six nine-pounders, and that they intended to sail her, with or without convoy, about the 1st of May. In fact, the *Brilliant*, finding an opportunity of convoy, sailed on the 23rd of April, and was captured by an American privateer on the 11th of May. The JUDGE ADMIRAL in Scotland held that the insured could not recover, being of opinion "that the risk which the underwriters undertook, being confessedly that on a vessel to sail the 1st of May, was perfectly different from one on a vessel which sailed on the 23rd April, inasmuch as the insurers undertook a risk on a vessel understood to be in harbour and safe on the 1st of May, when in fact she had been eight days at sea." The LORD CHANCELLOR (Lord ELDON), at the close of the argument, observed that the question for a jury would have been, "was there a misrepresentation of a material fact affecting the risk covered by the policy;" and he distinguished the case from *Bowden v. Vaughan*, on the ground that the policy was on ship as well as on goods, — meaning (presumably) that the sailing of the ship was a circumstance within the power of the insurers. In giving judgment the LORD CHANCELLOR said: "There is a difference between the representation of an expectation and the representation of a fact. The former is imma-

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terial, but the latter avoids the policy if the fact misrepresented be material to the risk. After the most attentive consideration of the case it appears to me that the judgment of the Court below is right."

There is a ruling of Lord TENTERDEN at *Nisi Prius* by which it appears that that learned Judge at one time thought that the insured could not be bound by a statement, unless made part of the contract, of a fact in the future within his own power. This was in *Flinn v. Tobin* (1829), 1 Moody & Malkin, 367. The question arose out of an insurance on ship for a voyage. It was in evidence that the first underwriter had inquired what cargo the ship was to take, and being informed that she was to take rock-salt, refused to insure her; that the broker, after going to make further inquiries, returned saying that she would only take fifty or sixty tons of rock-salt, which would put her in light ballast trim. Lord TENTERDEN said that the defendant would not be entitled to a verdict unless he satisfied the jury that there was a fraudulent misrepresentation of the cargo. Another case out of the same insurance was argued before the King's Bench: *Flinn v. Headlam* (1829), 9 B. & C. 693. The evidence was similar to that in *Flinn v. Tobin*, with the addition that the agent was told that the insurance would be effected if he got a certificate of the ship's repair and seaworthiness, and that this was done. The jury found a verdict for the plaintiff, and said they thought the representation was not material. In finally disposing of the case, Lord TENTERDEN, Ch. J., said: "If the jury thought that the defendant took the risk, not on the representation that only a small quantity of rock-salt had been, or would be, put on board, but on account of the certificate of seaworthiness, they said rightly that the representation by the owner's agent was not material." This seems to suggest that he entertained a doubt as to his former ruling; and, at all events, is consistent with the view that a positive statement, as to a fact within the power of the insured, although in the future, is for this purpose equivalent to a representation of fact.

On effecting an insurance on freight from Belize to Rendez-vous point on a certain island on the Honduras coast, and back and thence to London, the only information possessed by either party as to the locality of Rendez-vous point was contained in a letter which the owners had received from the captain of the vessel, written from Belize, in which Rendez-vous point was thus described: "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place and consider it quite safe." It appeared that Rendez-vous point, at the time of year in question, was not a safe anchorage; but on a verdict of a jury that the captain and the pilot both considered it so, the assured was held entitled to

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recover on the policy. In effect the statement was regarded by the Court, not as a representation of fact, but of opinion. *Anderson v. Pacific Fire and Marine Insurance Co.* (1872), L. R. 7 C. P. 65, 26 L. T. 130, 20 W. R. 280.

AMERICAN NOTES.

Bowden v. Vaughan is cited in 1 Parsons on Marine Insurance, p. 420, as "carrying this construction very far." Neither Beach nor May nor Biddle cites either of these cases. The matter of the Rule has been to some extent anticipated in the last two notes.

This doctrine adopted as to a statement of the time when a vessel will sail. *Allegre's Adm'r v. Maryland Ins. Co.*, 2 Gill & Johnson (Maryland), 136; 20 Am. Dec. 424. "In this case a future event is spoken of, in its nature contingent, and of which the party speaking could not possibly possess any certain knowledge." Citing *Bowden v. Vaughan*, and *Rice v. N. E. M. Ins. Co.*, 4 Pickering (Mass.), 439, where it was said: "We think that the statement of a day on which a vessel will sail is substantially nothing more than stating an expectation that she will sail on that day." "The most positive intentions to sail on any future day amount only to a strong expectation, for it must depend on the elements and other causes affecting the sailing of vessels whether such intentions shall be executed or not; and if the time of sailing be material to the risk, the insurer would be as likely to require a warranty that the vessel would sail or had sailed on the day proposed, if it were stated positively, as if stated only as an expectation." Disapproving and distinguishing *Dennistoun v. Lillie*, 3 Bligh, 202.

There is a very elaborate and learned examination of this subject by WALWORTH, Chancellor, in *Alston v. Mech., &c. Ins. Co.*, 4 Hill (N. Y.), 329, where the Court of Errors, unanimously reversing the decision of the Supreme Court, held that a mere unfulfilled promise by the applicant for fire insurance to substitute a stove for a fireplace did not vitiate his policy, unless fraudulently made. This is founded on the *Rice* and *Allegre* cases, *supra*, and he also cites *Bryant v. Ocean Ins. Co.*, 22 Pickering (Mass.), 200, where the same was held as to the nature of the cargo to be shipped. He sums up the matter thus: "These cases therefore show that a statement as to a future fact or event which is in its very nature contingent, and which the insurer knows the party could not have intended to state as a known fact, but as an intention or expectation merely, if honestly made, and not with an intent to deceive, is not a collateral contract or a promissory representation which the assured is bound to see performed to render his policy valid. But if the underwriter considers the statement material to the risk, and is unwilling to insure at the contemplated premium without binding the assured to the performance of it as a condition precedent to his liability, he should make it a part of the contract stated in the policy."

The point was also examined with his accustomed exhaustive research by GRAY, J., in *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540, as to a promise in respect to future occupancy, citing "the leading case of *Carter v. Boehm*,

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supra, and many other English cases. He observes: The word 'representations' has not always been confined in use to representations of facts existing at the time of making the policy, but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty which must be strictly complied with) are sometimes called 'promissory representations,' to distinguish them from those relating to facts, or 'affirmative representations;' and these words express the distinction: the one is an affirmation of a fact existing when the contract begins; the other is a promise to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself, or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence, of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract which has once taken effect dependent on the performance or breach of an earlier agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract."

In Pennsylvania it has been held that a mere "declaration" that an applicant for life insurance "will not practice any pernicious habit that obviously tends to the shortening of life," does not avoid the policy if not complied with, although the policy declared that the same should be void if any of the statements or declarations in the declaration should be found untrue. *Knecht v. M. L. Ins. Co.*, 90 Penn. State, 118; 35 Am. Rep. 641. (One Judge dissented.)

But in *Blumer v. Phoenix Ins. Co.*, 45 Wisconsin, 622, a written promise in the application not to use a certain kind of oil was held a binding promissory representation or warranty. (One Judge dissented in a very elaborate opinion.) And if the word "guarantee" is used, the result is the same. *Knecht v. M. L. Ins. Co.*, *supra*. So of the word "declare," with warranty of "declarations." *Schultz v. M. L. Ins. Co.*, 6 Fed. Rep. 672.

Mr. Biddle strongly disapproves the doctrine of the Kimball and Alston cases (1 Ins., sect. 535), and thinks the "true rule was stated by Lord ELDON in *Dennistoun v. Lillie*" (ibid. 536). The distinction between oral and written promises made by Mr. Justice GRAY is disapproved by Mr. Duer (Ins.,

749); but Mr. May says it "will be likely to command the assent of the profession. It is a learned, clear, and satisfactory statement of the distinction referred to, and the reason upon which it rests." (1 Ins., sect. 182.) The doctrine of promissory representations, however, is clearly distinguishable from that of mere belief or expectation.

The cases on this point in fire policies in respect to keeping a watchman are, as Mr. May says (1 Ins., sect. 250), "perplexingly conflicting. On the one hand, they are held to be mere statements of existing facts, for the truth of which alone the applicant is responsible, and not warranties that the existing *status* shall continue. So it has been held with reference to a statement that a mill 'is never left alone, there being always a watchman left in the building when it is not running:' *Worswick v. Canada F. Ins. Co.*, 3 App. Rep. (Ontario), 487; that an account of stock is taken once in three months: *Wynne v. Liverpool, &c. Ins. Co.*, 71 North Carolina, 121. On the other hand, it has been distinctly and repeatedly held that a statement that a watchman is kept on the premises at night, and at all other times when the mill is not in operation, or when the workmen are not present, is a warranty that the practice shall continue. *Whitlaw v. Phoenix Ins. Co.*, 28 Upper Canada C. P. 53; *Blumer v. Phoenix Ins. Co.*, 45 Wisconsin, 622. The same doctrine was held also in another case in Wisconsin, where the statement was that the machinery was 'regularly oiled with lard and sperm oil by the engineer and miller.' *Redman v. Hartford F. Ins. Co.*, 00 Wisconsin, 000; see *Garcelon v. Ins. Co.*, 50 Maine, 580." In the last case the words "well ventilated," not in answer to any inquiry, were held to be a mere representation; citing *Houghton v. Manuf. M. F. Ins. Co.*, 8 Metcalf (Mass.), 114; *Elliott v. Hamilton M. F. Ins. Co.*, 13 Gray (Mass.), 139. Mr. May continues: "In another very late case (*Albion Lead Works v. Williamsburgh City F. Ins. Co.*, 2 Federal Reporter, 479), the very unsatisfactory condition of the law upon this point was thus stated: 'It is impossible to recognize the decisions upon this question of a continuing warranty. When an underwriter asks about the particulars of a risk, he probably takes it for granted that things will remain as they are; but when the Courts are asked to convert this impression into a covenant, and make words in the present tense operate as a stipulation for the future, there is a difficulty, and the authorities are doubtful and divided. The result, so far as I can gather it, is that when the fact appears to the Courts to be a very important one, such as the employment of a watchman, a majority of them have said that this ought to be considered a part of a continuing engagement. When the fact does not appear to be so important, as that a dwelling-house is occupied, or that a clerk sleeps in the store, it is not of that character.' It is obvious that the test here given — the greater or less importance of the fact — is practically no test at all; and it is to be regretted that there has been any departure from the salutary rule that the Courts will not find warranties where the parties have not clearly made them. It would have been fortunate if they had found more difficulty in converting 'impressions' or expectations into covenants."

In *Gilliat v. Pawtucket Ins. Co.*, 8 Rhode Island, 282; 91 Am. Dec. 229, the question in the application, "What are the facilities for extinguishing fires?"

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was answered, "A force-pump and an abundance of water." *Held*, not a continuing warranty. Here however there were other questions directed to the present state of things, and one question seeking a direct engagement for the future conduct of the premises, showing "that when they wish information as to the present they ask it, and when they require a promise for the future they put the question to insure under it, and that they understood that a question as to the present was not to be asked (answered?) as one directed to the future."

A representation that the property insured is a private dwelling-house is not a warranty that it will not be used for any other purpose. *Rafferty v. New B. F. Ins. Co.*, 3 Harrison (New Jersey), 480; 38 Am. Dec. 525. (See *post*, No. 52, p. 000.)

A statement that "ashes are thrown out" is not a continuing warranty. *Hartford P. Ins. Co. v. Harmer*, 2 Ohio State, 452; 59 Am. Dec. 684.

A statement that a building "will be occupied by a tenant" is not a warranty, but a mere statement of an expectation. *Herrick v. Union M. F. Ins. Co.*, 48 Maine, 558; 77 Am. Dec. 244.

In an application it was stated that smoking was not allowed on the premises. This was held to be a warranty only that the assured himself would not smoke, nor allow others to do so if by reasonable precaution he could prevent it. *Insurance Co. v. McDowell*, 50 Illinois, 120; 99 Am. Dec. 497.

"No stoves used" was held not to be a continuing warranty. *Aurora F. Ins. Co. v. Eddy*, 55 Illinois, 213. "Iron doors and shutters" was held not to be a warranty that they should be kept closed at any particular time. *Scott v. Quebec Ins. Co.*, 1 Stuart (Low. Can.), 147.

No. 28. — PAWSON v. WATSON.

(1778.)

RULE.

A REPRESENTATION, although made at the time of entering into the contract and intended to be relied on by the other party, does not form part of the contract or policy. In this a representation differs from a warranty; and the difference in effect is that a representation is sufficiently borne out if the risk is not materially varied by the true state of facts as compared with that represented; whereas a warranty must be strictly and literally complied with.

Pawson v. Watson.

2 Cowp. 785-790.

Representation. — Distinguished from Warranty.

[785] A warranty inserted in a policy of insurance must be literally and strictly complied with. A representation to the underwriter need only be substantially performed. But if false in a material point, it will avoid the policy.

Upon a rule to show cause why a new trial should not be granted in this case, Lord MANSFIELD reported as follows: This was an action upon a policy of insurance. At the trial it appeared in evidence that the first underwriter had the following instructions shown him: "Three thousand five hundreds pounds upon the ship *Julius Cæsar*, for Halifax, to touch at Plymouth, and any port in America. She mounts twelve guns and twenty men." These instructions were not asked for or communicated to the defendant; but the ship was only represented generally to him, as a ship of force: and a thousand pounds had been done, before the defendant did anything upon her. The instructions were dated the 28th June, 1776, and the ship sailed on the 23rd July, 1776; and was taken by an American privateer. That at the time of her being taken she had on board six four-pounders, four three-pounders, three one-pounders, six half-pounders, which are called swivels, and twenty-seven men and boys in all, for her crew; but of them, sixteen only were men (not twenty, as the instructions mentioned), and the rest, boys. But the witness said, he considered her as being stronger with this force, than if she had twelve carriage guns and twenty men: he also said (which is a material circumstance) that there were neither men nor guns on board at the time of insurance. That he himself insured at the same premium, without regard or inquiry into the force of the ship. Other underwriters also insured at the same premium, without any other representation than that she was a ship of force. That to every four-pounder there should be five men and a boy. That in merchant ships, boys always go under the denomination of men. This was met by evidence on the part of the defendant, saying, that guns mean carriage guns, not swivels, and men mean able men exclusive of boys.

There were three causes of the same nature,¹ depending upon the same * evidence: the defence in each was, that [* 786] these instructions were to be considered as a warranty, the same as if they had been inserted in the policy; though they were not proved to have been shown to any but the first underwriter. In all the three cases, the question reserved for the opinion of the Court is, "Whether the written instructions which were shown to the first underwriter are to be considered as a warranty inserted in the policy, or as a representation, which would only avoid the policy, if fraudulent?" If the Court should be of opinion that the instructions amounted to a warranty, then a new trial is to be granted in each, without costs; otherwise, the verdicts are to stand.

At the trial I was of opinion that it would be of very dangerous consequence to add a conversation that passed at the time, as part of the written agreement. It is a collateral representation; and if the parties had considered it as a warranty, they would have had it inserted in the policy. But, secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent; and in that light I held that a misrepresentation made to the first underwriter ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: for where a good man stands first, the rest underwrite without asking a question; and if he is imposed upon, the rest of the underwriters are taken in by the same fraud. The case was left to the jury under that direction.

Mr. Wallace, who showed cause, insisted that the instructions in question were no warranty, but a representation. That the policy is the formal instrument containing the final agreement of the parties; and therefore no instructions, parol or written, can be admitted to contradict it. 2. With respect to its being a fraudulent misrepresentation, the evidence proved, and the jury by their verdict found, there was no fraud. On the contrary, the terms of the representation were more than complied with; for by the evidence it clearly appears that the force actually on board exceeded the force specified in the instructions. Therefore he prayed the rule might be discharged.

¹ The names of the other two causes were *Pawson v. Snell* and *Pawson v. Ewer*.

Mr. Mansfield, Mr. Macdonald, and Mr. Davenport, *contra*, in support of the rule, contended that the instructions in question, being contained in the same paper as that which named the ship and captain, were the basis of the agreement between [* 787] * the parties; therefore, most clearly to be considered as a warranty: without it, there was no agreement at all. There was no ship, no subject upon which the policy could attach. If not intended as the foundation and ground of the insurance, why write down a specific force? Why not state only that she was a ship of force generally, unless that the real force she was to carry might be correctly understood? If there is a writing, whether inserted in the instrument or in any collateral paper, or whether a warranty technically so called or not, makes no difference. It is equally the basis of agreement between the parties; therefore in strictness it ought to be complied with. Suppose there had been no guns at all, could the plaintiff have recovered in that case? yet evidence of that would have been as much a contradiction to the policy as this, for no mention is made of guns in the policy. Or suppose it had been written in the margin of the policy, could the policy have stood? Clearly it could not. With respect to the necessity of the representation being material, as well as fraudulent, whether material or not does not depend upon the opinions of particular persons upon the particular case in question, but whether the subject itself is in its nature material. If the ship had been described to be of a particular colour, clearly that would have been no engagement, because in its nature immaterial. But guns in time of war are in their own nature material, and indeed of the very essence of a policy; for the premium is regulated accordingly. It is not enough to say, that in the opinion of two or three persons the force actually on board was equal. The insurer alone is to be the judge of that. But that is not the point. Whether she was in a better or worse state, the underwriter has a right to say, the truth of the case is not according to what I bargained for, and therefore there is no contract between us. Upon these grounds they prayed the rule might be made absolute.

Lord MANSFIELD asked, Whether there was any case that made a difference between a written and a parol representation? Upon receiving no answer, his Lordship proceeded to give his opinion as follows: There is no distinction better known to those who

No. 28. — *Pawson v. Watson*, 2 Cowp. 787, 788.

are at all conversant in the law of insurance, than that which exists between a warranty or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of the written policy, it must be performed. As if there be a warranty of convoy, there it must be a convoy. Nothing tantamount will do, or answer the purpose; it must * be strictly performed, as being part of the agree- [*788] ment; for there it might be said, the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement. If, in a life policy, a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy; because by the warranty he takes the risk upon himself. But if there is no warranty, and he says, "The man is in good health," when in fact he knows him to be ill, it is false. So it is if he does not know whether he is well or ill; for it is equally false to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true. But if he only says, "he believes the man to be in good health," knowing nothing about it, nor having any reason to believe the contrary; there, though the person is not in good health, it will not avoid the policy, because the underwriter then takes the risk upon himself. So that there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy, and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent. So far from the usage being to consider instructions as a part of the policy, parol instructions were never entered in a book, nor written instructions kept, till many years ago, upon the occasion of several actions brought by the insured upon policies, where the brokers had represented many things they ought not to have represented, in consequence of which the plaintiffs were cast; I advised the insured to bring an action against the brokers, which they did, and recovered in several instances; and I have repeatedly, at Guildhall, cautioned and recommended it to the brokers, to enter all representations made by them in a book. That advice has been followed in London; but it appeared lately, at the trial

of a cause, that, at Bristol, to this hour, they make no entry in their books, nor keep any instructions.

The question then is, "Whether in this policy the party insuring has warranted that the ship should positively and literally have twelve carriage guns and twenty men?" That is, "Whether the instructions given in evidence are a part of the policy?" Now, I will take it by degrees. The first two underwriters before the

Court are Watson and Snell. Says Watson, "It is part of [* 789] my * agreement, that the ship shall sail with twelve guns and twenty men; and it is so stipulated, that nothing

under that number will do. Ten guns with swivels will not do." The answer to this is, "Read your agreement; read your policy." There is no such thing to be found there. It is replied, Yes, but in fact there is, for the instructions upon which the policy was made contain that express stipulation. The answer to that is, There never were any instructions shown to Watson, nor were any asked for by him. What colour then has he to say that those instructions are any part of his agreement? It is said, he insured upon the credit of the first underwriter. A representation to the first underwriter has nothing to do with that which is the agreement, or the terms of the policy. No man who underwrites a policy subscribes, by the act of underwriting, to terms which he knows nothing of. But he reads the agreement, and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter, who is a good man, and which another will therefore give faith and credit to; but not to a collateral agreement, which he can know nothing of. The absurdity is too glaring; it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to the first underwriter, and makes a false representation to him in a point that is material, — as where having notice of a ship being lost, he says she was safe, — that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first. How, then, do Watson and Snell underwrite the ship in question? Without knowing whether she had any force at all. That proves the risk was equal to a ship of no force at all; and the premium was a vast one — eight guineas. So much, therefore, for those two cases. The third case is that of Ewer, who saw the instructions, with the representation which they contained. Did the number of guns induce him to under-

No. 28. — *Pawson v. Watson*, 2 Cowp. 789, 790.

write the policy? If it did, he would have said, "Put them into the policy; warrant that the ship shall depart with twelve guns and twenty men." Whereas, he does no such thing, but takes the same premium which Watson and Snell did, who had no notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ship of no force at all. The representation amounts to no more than this, "I tell you what the force will be, because it is so much the better for you." There is no fraud in it, because it is a representation only of what, in the then state of the ship, they thought would be the truth. And in real truth the ship sailed *with a larger force; [*790] for she had nine carriage guns, besides six swivels. The underwriters, therefore, had the advantage by the difference. There was no stipulation about what the weight of metal should be. All the witnesses say, "She had more force than if she had had twelve carriage guns, both in point of strength, of convenience, and for the purpose of resistance." The supercargo in particular says, "He insured the same ship and the same voyage, for the same premium, without saying a syllable about the force." Why, then, it was a matter proper for the jury to say, Whether the representation was false? or Whether it was in fact an insurance, as of a ship without force? They have determined, and I think very rightly, that it was an insurance without force. Ewer makes an objection that the representation ought to be considered as inserted in the policy; but the answer to that is, he has determined whether it should be inserted in the policy or not, by not inserting it himself. There is a great difference, whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. Thornton has paid, who was the first person that saw the instructions. Shall the rest refuse, then? As to Watson and Snell, they have no pretence to refuse, for there is not a colour for the objection made by them. As to Ewer, we are all satisfied with the determination of the jury against him. Therefore, the rule for a new trial must be discharged. N. B. On the Monday following, Mr. Davenport said, he was desired by the underwriters to ask, Whether it was the opinion of the Court, that to make written instructions valid and binding as a warranty, they must be inserted in the policy? Lord MANSFIELD answered, that most undoubtedly

that was the opinion of the Court. If a man warrants that a ship shall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy.

AMERICAN NOTES.

This case is cited in 1 May on Insurance, sects. 156, 148; and in many places in Biddle on Insurance, and in Parsons on Marine Insurance.

The American doctrine is in harmony with the Rule, and so familiar as not to justify discussion. It is sufficient to cite a selection of cases as to warranty: *Daniels v. Hudson R. F. Ins. Co.*, 12 Cushing (Mass.), 416; 59 Am. Dec. 192; *Ripley v. Ætna Ins. Co.*, 30 New York, 136; 86 Am. Dec. 362; *Bennett v. Ag. Ins. Co.*, 50 Connecticut, 420; *Thomas v. Fame Ins. Co.*, 108 Illinois, 91; *Schwarzbach v. Protective Union*, 25 West Virginia, 622; 52 Am. Rep. 227; *Alabama G. L. Ins. Co. v. Garner*, 77 Alabama, 210; *Cooper v. Farmers' M. F. Ins. Co.*, 50 Penn. State, 299; *Witherell v. Maine Ins. Co.*, 49 Maine, 200; *Jeffries v. Life Ins. Co.*, 22 Wallace (U. S. Sup. Ct.), 47; *Cobb v. Covenant M. B. Ass'n*, 153 Massachusetts, 176; 25 Am. St. Rep. 619; *Cont. Ins. Co. v. Kasey*, 25 Grattan (Virginia), 268; 18 Am. Rep. 681; *Bobbitt v. Liverpool, &c. Ins. Co.*, 66 North Carolina, 70; 8 Am. Rep. 494; *Stensgaard v. St. Paul, &c. Co.*, 50 Minnesota, 429; 17 Lawyers' Rep. Annotated, 575; *Smith v. Niagara F. Ins. Co.*, 60 Vermont, 682; 1 Lawyers' Rep. Annotated, 216; *Mut. B. L. Ins. Co. v. Robison*, 19 U. S. App. 266; 22 Lawyers' Rep. Annotated, 325.

These cases agree that a warranty is binding, whether it is made in fraud, mistake, or negligence, or is immaterial. The doctrine is well summed up by May: "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, Has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed." (It may perhaps be permitted to the editor to observe that in his opinion, the doctrine that a warranty is binding although upon a matter that is absolutely immaterial and trivial [such for example as that the insured keeps his ashes in an iron vessel, whereas it is really of copper], and which frequently is designed by the insurer as a trap for the simple and unwary, is a monstrous absurdity, and in good public policy ought not to be tolerated.)

It is the common practice for insurance companies to convert representations into a component part of the contract, and to make them warranties by a condition and stipulation to that effect in the policy; but in the absence of such agreement the doctrine of the Rule prevails here — only substantial compliance is exacted. It is sufficient to cite the following: *Mosley v. Ins. Co.*, 55 Vermont, 142; *Garcelon v. F. Ins. Co.*, 50 Maine, 580; *Tyler v. Ætna Ins. Co.*, 12 Wendell (N. Y.), 507; *Mutual Ins. Co. v. Deale*, 18 Maryland, 26; 79 Am. Dec. 673; *Keeler v. Niagara F. Ins. Co.*, 16 Wisconsin, 523; 84 Am. Dec. 714; *Protection Insurance Co. v. Harmer*, 2 Ohio State, 452; *Insurance*

Nos. 29, 30. — Potts v. Bell; Bird v. Appleton. — Rule.

Co. v. Chase, 5 Wallace (U. S.), 509; *Tesson v. Atlantic M. Ins. Co.*, 40 Missouri, 33; 93 Am. Dec. 293; *Curry v. Com. Ins. Co.*, 10 Pickering (Mass.), 535; 20 Am. Dec. 517; *Co-operative Ass'n v. Leftore*, 53 Mississippi, 1; *Cont. Ins. Co. v. Kasey*, 25 Grattan (Virginia), 268; 18 Am. Rep. 681; *Bobbitt v. Liverpool, &c. Ins. Co.*, 66 North Carolina, 70; 8 Am. Rep. 494.

A representation is clearly distinguishable from a warranty. The former is part of the proceedings which propose a contract, while the latter is part of the completed contract. The falsity of the former may render the policy voidable for fraud; but a non-compliance with the latter is an express breach of the contract. *Wheaton v. North British, &c. Ins. Co.*, 76 California, 415; 9 Am. St. Rep. 216.

SECTION IV. — *Illegality.*No. 29. — POTTS *v.* BELL

(1800.)

No. 30. — BIRD *v.* APPLETON.

(1800.)

RULE.

A CONTRACT of insurance upon ship or goods for a voyage having for its object an illegal purpose, is illegal and void; but the fact that a ship has been engaged on a voyage for an illegal purpose is no reason for avoiding an insurance on the ship or goods for a distinct and separate voyage.

Potts v. Bell.

8 T. R. 548-561 (5 R. R. 452).

[This case is fully reported as No. 4 of "ALIEN," 2 R. C. 654.]

Bird and others v. Appleton.

8 T. R. 562-571 (5 R. R. 468).

Insurance. — Illegal Acts on Separate Voyage.

If a ship be insured "at and from A. to B.," and there be any illegality in the traffic during her stay at A., the assured cannot recover on the policy for a loss happening between A. and B. Goods may be insured,

No. 30. — Bird v. Appleton, 8 T. R. 562.

though purchased with the proceeds of a former illegal cargo. An insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure. A warranty of neutrality in a policy of assurance is not falsified by a sentence of a foreign Court of Admiralty condemning a ship for navigating contrary to the ordinances of that belligerent State to which the neutral country had not assented.

The first count in the declaration was on a policy of assurance on goods on board the *Confederacy*, an American ship, "at and from Canton, in China, to Hamburgh or Copenhagen, with liberty to touch, stay, and trade at all ports and places whatsoever, particularly a port in the channel," effected by the plaintiffs, for the benefit and on the account of Leffingwell and another. The second count was on a policy on the ship *Confederacy*, "at and from Canton," &c., as in the first count. It was stated, that the ship sailed from Canton, having the goods on board, and that she was taken as prize in the course of her voyage, before her arrival at Hamburgh or Copenhagen. The defendant pleaded the general issue; and, on the trial before Lord KENYON, a special verdict was found.

In the special verdict it was stated, that the plaintiffs caused to be effected the two policies of assurance, mentioned in the declaration, for Leffingwell and another; that the ship *Confederacy* was an American-built ship, the property of American subjects, by whom she was sold, in 1795, in the port of London, to Leffingwell and another, also Americans; that the ship was afterwards loaded in and cleared out, and sailed from London for Madeira, from whence she proceeded to the Isle of Bourbon, and thence to Mauritius, at which places the greatest part of the cargo was disposed of; that from Mauritius she proceeded to Bombay, where she arrived in June, 1796; that during all this time she was commanded by S. Jencks, a citizen of the United States of America, "and was furnished with and had on board a proper passport, duly made out and granted according to the form annexed to the treaty of commerce" between France and the United States of America; that during the time the ship was at Bombay, the remainder of the cargo was landed and disposed of, and the captain obtained from the governor in council a license to load on board the *Confederacy* a cargo of cotton, and to proceed with the same for sale from thence to Canton in China; that having taken on board such a cargo, the captain sailed in the ship for Canton, and in his passage thither touched at the island of Puloopinang, where he

No. 30. — Bird v. Appleton, 8 T. R. 562, 563.

took on board a quantity of tin for ballast, of the value of £3500, and arrived at Canton in October, 1796, where her cargo was sold and disposed of, and the goods mentioned in *the first [* 563] count in the declaration (the property of Leffingwell and another) were at Canton loaded and put on board to be carried from thence to Hamburgh; that the proceeds of the cargo from Bombay to China were employed in the purchase of part of the cargo from China to Europe; that the voyage from London to Canton and the voyage from Canton to Europe were two voyages; that the ship sailed from Canton towards Hamburgh with the goods on board in January, 1797, and whilst she was on her voyage was captured by a French ship of war and carried into Nantes, where proceedings being instituted before the tribunal for determining the questions of prize, the ship and cargo were condemned as prize. [The sentence of condemnation was set forth at length in the special verdict; but it is omitted here, because this Court considered that the condemnation proceeded entirely on the ground that the ship had violated some of the French ordinances.] It then stated that in the treaty between this country and America, referred to in the Stat. 37 Geo. III., c. 97, the following article is contained: "His Majesty consents that the vessels belonging to the citizens of the United States of America shall be admitted and hospitably received in all the seaports and harbours of the British territories in the East Indies; and that the citizens of the said United States may freely carry on a trade between the said territories and the said United States in all articles of which the importation or exportation respectively to or from the said territories shall not be entirely prohibited; provided only that it shall not be lawful for them in any time of war between the British Government and any other power or State whatever to export from the said territories without the special permission of the British Government there, any military or naval stores or rice. The citizens of the United States shall pay for their vessels when admitted into the said ports no other or higher tonnage duty than shall be payable on British vessels when admitted into the ports of the United States; and they shall pay no other or higher duties or charges on the importation or exportation of the cargoes of the said vessels than shall be payable on the same articles when imported or exported in British vessels: but it is expressly agreed that the vessels of the United States shall not carry any of the articles

exported by them from the said British territories to any port or place, except to some port or place in America where the same shall be unladen ; and such regulations shall be adopted by both parties as shall from time to time be found necessary to enforce the due and faithful observance of this stipulation. It is [* 564] also understood that * the permission granted by this article is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the British territories ; but vessels going with their original cargoes or part thereof from one port of discharge to another are not to be considered as carrying on the coasting trade ; neither is this article to be construed to allow the citizens of the said States to settle or reside within the said territories, or to go into the interior parts thereof without the permission of the British Government established there. And if any transgression shall be attempted against the regulations of the British Government in this respect, the observance of the same shall and may be enforced against the citizens of America in the same manner as against British subjects or others transgressing the same rule. And the citizens of the United States, whenever they arrive in any port or harbour in the said territories, or if they should be permitted in manner aforesaid to go to any other place therein, shall always be subject to the laws, government, and jurisdiction of whatever nature established in such harbour, port, or place, according as the same may be. The citizens of the United States may also touch for refreshment at the island of St. Helena, but subject in all respects to such regulations as the British Government may from time to time establish there." The verdict concluded with praying the advice of the Court, assessing the damages separately on the two counts, in case the Court should be of opinion that the plaintiffs were entitled to recover upon either of them.

This case had been before the Court several times before, on a motion for a new trial, and afterwards on a special verdict, after the former special verdict had been argued a *venire de novo* was awarded, because damages were given generally on both the counts in the declaration ; and the Court intimated an opinion that though the plaintiffs might recover on one count, they were not entitled to recover on the other. Accordingly the case went to another jury, when the present verdict was found, differing from the former in several particulars, but principally in these : that in this

No. 30. — *Bird v. Appleton*, 8 T. R. 564, 565.

verdict the damages were separately assessed on the different counts, and it was now stated that the voyage from London to Canton, and that from Canton to Europe, were two distinct voyages. This verdict was now argued by Law for the plaintiffs, and Adam for the defendant.

The second count, on the policy on the ship, was now abandoned by the plaintiffs' counsel, on this ground, that as the policy on the ship attached "at and from Canton," including the period of time when the cotton taken in at Bombay (an illegal cargo * being in contravention of the treaty between this [* 565] country and America) was still on board; and as the immediate voyage and adventure insured could not be divided into parts, the whole must be deemed an illegal adventure.

But on the first policy, that respecting the goods, several questions were made. It was objected, on the part of the defendant, that the plaintiffs could not recover on this count, — 1st, Because the goods insured were purchased with the proceeds of an illegal cargo, that procured at Bombay (it being admitted that the governor's license to purchase it was illegal); and that such an adventure was contaminated by such antecedent illegal traffic. 2ndly, Because the voyage from Bombay to Canton was only a part of a larger voyage, out and home from London to Canton, and from Canton to Europe; and that as the ship, in the course of the voyage, traded at Bombay, contrary to the treaty between this country and The United States of America, by not returning directly (*Wilson v. Murryat*, 8 T. R. 31) from Bombay to America, the whole voyage was illegal. 3rdly, Because the ship was seizable for a violation of the navigation act in a prior part of the voyage, from Bombay to Canton; and consequently that the goods insured were not put on board a proper ship, such an one as the assured impliedly undertook to provide; and that the right of seizure continued at least during the time that the ship was on the high seas, and until her return home. 4thly, Because the sentence of condemnation by the tribunal at Nantes negatived the ship, being an American.

On the part of the plaintiffs it was answered, 1st, That it was perfectly immaterial in this case to consider how the funds were acquired with which the cargo insured was purchased; it being sufficient for the purpose of this question that the cargo, when bought, was meant to be conveyed in the course of a legal voyage.

2ndly, That the fact on which this objection was founded was negatived by the verdict; where it was expressly stated that these were two distinct voyages, and consequently that the homeward voyage from Canton to Europe could not be affected by any illegality in the voyage outwards. 3rdly, That the circumstance of the ship having been liable to seizure for an act done before the commencement of the voyage insured, could not affect this policy; for that the ship could only be seized *flagrante delicto*, during the same voyage, otherwise she could never afterwards be [* 566] legally insured; and that the seizure * of the ship for an antecedent cause of forfeiture was not within the scope of the indemnity of the underwriters, as they are only liable for risks incurred during the voyage insured. *Lockyer v. Offley*, 1 T. R. 252 (1 R. R. 194). 4thly, That it appeared by the concluding part of the sentence, that the ship and cargo were condemned for having violated some of the French ordinances, which were not obligatory on the Americans, and consequently that this sentence did not negative the ship being an American. *Pollard v. Bell*, 8 T. R. 434 (5 R. R. 404).

Lord KENYON, Ch. J. — Although this case has only been argued once on this special verdict, yet as the question has been so frequently canvassed of late, we have had an opportunity of considering it; and as the parties may expect not to be kept longer in suspense, we will dispose of the case now. It is now admitted by the counsel for the plaintiffs, and very properly so, that the policy on the ship must be abandoned, because during part of the time that the parties intended that the policy should attach, namely, while the ship was at Canton, there was something illegal in the transaction; therefore, we are now delivered from all consideration respecting that part of the case.

With regard to the other part of the plaintiffs' claim on the policy on the goods, the arguments urged by the defendant's counsel have not convinced me that this contract is illegal, because the goods insured were procured with the proceeds of a former illegal cargo. If this objection were well founded, it would go to an alarming extent. In deciding on a claim made on a policy of insurance, it would be necessary to examine and scrutinise the past conduct of the assured, in order to see whether or not, by their former transactions in life, they had illegally acquired the funds with which the particular goods insured were purchased:

but we cannot enter into considerations of that kind; we must confine ourselves to the immediate transaction before us; and whatever my former opinion may have been on the facts of this case, the jury have relieved us from one consideration, by finding expressly as a fact that these were not two connected parts of one voyage, but that the voyage homewards from Canton was a separate and distinct voyage from that to Canton: the homeward voyage therefore cannot be affected by the former outward voyage. The case of *Pollard v. Bell*, that has been alluded to in the argument, was decided by us after great consideration; and though that case could not be reconsidered by a Court of Error, as the facts did not appear on the record, * fortunately for [* 567] ourselves, as well as for the parties here, there is a mode by which our judgment in this case, if erroneous, may be corrected; and the defendant, if he be dissatisfied with the grounds of our decision in *Pollard v. Bell*, will have an opportunity of canvassing that decision by bringing a writ of error in this case: but after the greatest attention that I have been able to bestow on the subject, I adhere to the opinion that we gave in that case; and that decision is directly in point to the present case. It was there established as a proposition, that the judgments of the Courts of Admiralty are to proceed on the known *jus gentium*, or on the treaties between particular States; that such treaties do not alter the *jus gentium* with respect to the rest of the world, but as between those particular States they are considered as engrafted on the *jus gentium*; and that one State has no authority by any ordinance of its own to vary the general law of nations as to other States. Then what is the ground on which this sentence of condemnation proceeded? Unquestionably, a violation of the French ordinances only. At first I was struck with one of the considerations mentioned in the sentence, respecting the passport: "Considering that so far from derogating from this general regulation for all nations in favour of the Anglo-Americans, by the treaty of the 6th of February, 1778, this treaty implicitly subjects them to it by the 25th and 27th articles, which oblige them to conform to the model of the passport annexed to the treaty." But that was conformed to; for it is expressly found by the special verdict, that "the ship was furnished with and had on board a proper passport, duly made out and granted according to the form annexed to the treaty of commerce between France and The United States of

America;" and after attentively considering the whole of the sentence of condemnation, it appears to me, beyond all controversy, that the ground on which it proceeded is that which is mentioned in the concluding part of the sentence: "The tribunal, in conformity to the above-mentioned laws¹ and regulations, and particularly of the decree of the executive Directory of the 12th Ventose, 5th year, adjudges and declares the validity of the prize of the foreign ship the *Confederacy*, Captain Scott Jencks, captured by the privateer *Duguai Trouin*, Captain Dutache, as also of all her appurtenances and dependencies, tackle, apparel, and utensils; adjudges and declares likewise the validity of the [* 568] prize of all the goods and effects composing * the lading or cargo of the said ship the *Confederacy*, in default of Captain Jencks and the supercargo Pierpont being regular in their list of crew and their despatches." Now that is neither required by the law of nations nor by the treaty between France and the United States of America; and it is found by the verdict, that all the requisites of that treaty were complied with. The foreign Court thought that they had a right to impose something on an independent nation beyond what is required by the law of nations, or by the treaty entered into by that independent nation; but that certainly is not obligatory on such nation; therefore, in conformity with the decision in the case of *Pollard v. Bell*, I think I am bound to conclude that the plaintiffs are entitled to recover on the policy of insurance on the cargo; and that on the other count, on the policy on the ship, the judgment must be for the defendant.

GROSE, J. — The plaintiffs have now given up their claim on the policy respecting the ship; and the defendant has attempted to impeach the policy on the cargo, first, on the ground that the goods insured were purchased with the proceeds of a former illicit cargo; and, secondly, on the ground that the foreign sentence is conclusive as to the fact that this was not an American ship. With regard to the first point, arguments *ab inconvenienti* are alone sufficient to determine it. If we were to decide that such a cargo could not be insured, it would be difficult to say to what consequences it would lead; the principle of that decision would equally extend to the second, nay to the hundredth, cargo purchased afterwards, and to the ship itself, so that such a ship never could after-

¹ Which, by a reference to a former part of the sentence, appear to be those of the *Brumaire*, 4th year; and 26th July, 1778.

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wards become the subject of a legal insurance, even in the hands of subsequent purchasers. I know of no principle of law to warrant such a doctrine; and I think that we ought not to establish so inconvenient and absurd a rule. Then it remains to be considered, Whether or not the case of *Pollard v. Bell* were properly decided? and if it were, Whether it ought not to govern the present case? I have heard no arguments to induce me to think that we judged erroneously in determining that case; and it appears to me to be a direct authority for the present. Though the foreign sentence is drawn in an inaccurate and rather a confused manner, I think that the condemnation proceeded solely on the ground that the ship in question had violated some of the French ordinances; and not because she had infringed the law of nations, or the particular treaties that subsisted between France and America; therefore, without repeating the reasons given in the case of *Pollard v. * Bell*, I think that the decision must [*569] govern us in determining this case.

LAWRENCE, J. — It has been contended on the part of the defendant that the plaintiffs cannot recover on the policy on the goods, which are the subject of this insurance, because they were bought with the proceeds of an illegal cargo, and because the ship on board which the goods in question were put, having violated the treaty by trading from Bombay to Canton, was liable to be seized; and further, because the ground of the sentence of condemnation was not for having violated any of the French ordinances merely, but for an infraction of the treaty between France and America; the propriety of which sentence we cannot examine. With regard to the first of these objections, in such a case as the present we cannot inquire into the means by which the merchant gains the money that is afterwards laid out in the purchase of goods: if the money were obtained by robbery on the highway, and invested in the purchase of a cargo, I do not know why that cargo may not be legally insured. In order to render the insurance illegal, the illegality should exist during the course of the voyage insured. Nor do I think that the next objection, that the plaintiffs cannot recover because the ship was liable to seizure, is well founded. Here the illegality commenced by the captain taking on board a cargo at Bombay, in order to carry it to Canton for sale. But the doctrine relied upon by the defendant is perfectly new: that the assured cannot recover on the policy against

the underwriters, because the ship in a prior voyage had been guilty of some transgression for which she was liable to be seized! That is not a risk within the policy; if the ship had been seized for this cause during the voyage insured, the underwriters would not have been liable; they are only liable for risks in the course of the voyage insured. Then the only remaining question is, Whether or not it were decided by the foreign sentence that the ship was not an American? It was determined in the case of *Pollard v. Bell* that a sentence of condemnation for violating the ordinances of one nation, not adopted by the treaty between that nation and the country of which the owner of the property insured is a subject, will not prevent the assured recovering on the policy, on the ground that such sentence negatives the warranty of neutrality. But the attempt on the part of the defendant here is not so much to dispute the authority of that case, as its application to the case before us. However, I am of opinion [* 570] that, on the whole, we must consider * that the foundation of this sentence of condemnation was the violation of French ordinances only, and consequently that the case of *Pollard v. Bell* is a direct authority for the present.

LE BLANC, J. — It is insisted that the plaintiffs are not entitled to recover for the goods insured, first, on the ground that the homeward cargo from Canton to Europe was in part purchased with the proceeds of the goods sold at Canton; and, secondly, on the ground that the ship was liable to seizure on her homeward-bound voyage, because she had before been trading illegally. But I cannot assent to the doctrine that we must inquire how the money was procured with which the cargo insured was purchased in order to see whether or not the underwriters be liable on their contract of insurance. According to that doctrine, it would be necessary to trace the money through the various channels in which it may have passed before it got into the pocket of the merchant, before we could decide whether or not a subsequent contract of insurance on goods purchased with such money were legal. But such a proposition cannot be supported in a Court of law. With regard to the other ground of defence, I do not think that the right of the assured to recover on this policy is impeached, because the ship, in part of another voyage, which is found by the special verdict to be a distinct voyage from the one in question, was engaged in an illegal traffic. If the ship had

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been seized in the course of the former illegal voyage, the underwriters might then have said that they had not indemnified the owners against such a risk ; but no such illegality did exist during any part of this voyage. Then it only remains to be considered whether or not the warranty that the ship was an American is negatived by the sentence of condemnation. We must look to the concluding part of this sentence, to see the grounds on which the foreign Court professed to decide. If that determination had been founded either on the law of nations or on the treaty subsisting between France and America, we could not have inquired whether or not that Court had formed a right decision. But if we see that that Court condemned the ship and cargo neither on the law of nations nor on the treaty between America and France, then we are bound to declare that such a sentence is not conclusive on the parties to this action : it does not affect the question respecting the warranty of neutrality ; and I think that the sentence is founded simply on an infringement of the French ordinances, which are particularly pointed out in the sentence, and not on any breach of the law of nations or of

* the treaty between France and America. For these [* 571] reasons, therefore, I concur in the opinion given by the rest of the Court, that the plaintiffs are entitled to recover on the policy on the goods.

PER CURIAM,

Judgment for the plaintiffs on the first count, and for the defendant on the second.

ENGLISH NOTES.

The principle of *Potts v. Bell* was extended in *Furtado v. Rogers* (1802), 3 Bos. & P. 191, 6 R. R. 752, to an insurance effected in Great Britain on a French ship previously to the commencement of hostilities between Great Britain and France, to the effect that such an insurance could not cover a loss by British capture during the war. A contract to indemnify the enemy for a loss put upon him by the deliberate policy of the country would of course be illegal. And if a contract which is innocent in its inception becomes, by reason of war breaking out, a contract for such an indemnity, that circumstance terminates—or so far as it includes such indemnity constitutes an implied exception from—the liability of the insurer. See also *Kellner v. Le Mesurier* (1803), 4 East, 296, 7 R. R. 581; *Gamba*

v. *Le Mesurier* (1803), 4 East, 407, 7 R. R. 590; *Brandon v. Curling* (1803), 4 East, 410, 7 R. R. 592. The case is different where, by the government of the country of the insured, an embargo is laid on in time of peace for a temporary and collateral purpose, which in the event causes a loss within the policy. There is nothing, in such a case, contrary to public policy, in giving effect to the indemnity. *Aubert v. Gray* (Ex. Ch. 1862), 3 B. & S. 169, 32 L. J. Q. B. 50, 9 Jur. (N. S.) 714, 7 L. T. 469, 11 W. R. 27 (overruling *Conway v. Gray*, 10 East, 536, and other cases).

An insurance upon the interest of an alien enemy is, like any other contract with an alien enemy, void: *Potts v. Bell*, 2 R. C. 654; and where such an insurance was made by the agent in this country, after the commencement of hostilities, but in ignorance of the fact, he was allowed to recover the premium: *Oom v. Bruce* (1810), 12 East, 225, 11 R. R. 367.

It is to be here observed that the risks of capture in future wars between States who were parties to the Declaration of Paris of 1856 are considerably altered by the 2nd and 3rd articles: —

“2. The neutral flag covers enemy’s goods, with the exception of contraband of war.

“3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag.”

But it does not appear that there is anything in these articles to render valid a contract of insurance of an enemy’s interest in either ship or goods, any more than any other contract with an alien enemy. Arnould on Insurance, 6th ed., p. 716.

Where there is an entire voyage, the illegality of any part of it makes the whole illegal; so that the insured cannot recover on a policy for any part of it. Per Lord KENYON, Ch. J., in *Wilson v. Marryat* (1798), 8 T. R. 31, 46; *Bird v. Pigou*, 2 Selw. N. P. 1000; Arnould on Insurance, 6th ed., p. 689 n.

Where a policy was effected on goods to be thereafter specified, and the insured in his subsequent specification included goods the exportation of which was illegal by a statute giving effect to the King’s Proclamation, the policy became illegal *in toto*, and the insured could not recover on it. *Parkin v. Dick* (1809), 11 East, 502, 11 R. R. 258.

But where, during war with Russia, the plaintiff, a merchant having a license on behalf of himself and all other neutral merchants to export goods by a certain vessel to ports in the Baltic, insured in one policy goods shipped by that vessel, including some goods the property of Russian subjects, it was held that although the policy was void so far as relates to the interest in goods belonging to the alien enemies, it was valid as to the interest of the plaintiff himself and

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the neutral merchants in the goods (being a separate and distinct part of the cargo) belonging to them. *Hagedorn v. Bazett* (1813), 2 M. & S. 100.

In an action by an underwriter against the broker to recover a premium on a policy subscribed by him, it appeared that the language of the policy was large enough to cover an adventure which would be manifestly illegal, and that this was the adventure actually intended and entered on by the assured. It was held that the plaintiff could not recover. Lord ELLENBOROUGH placed the plaintiff in this dilemma: "The policy being large enough to cover an illegal adventure, and an illegal adventure being in fact intended to be covered by the policy, if the plaintiff really meant to protect that adventure, his subscription was illegal, and, consequently, his present demand being grounded on an illegal consideration, cannot be sustained. If he did not mean to protect that adventure, but supposed that some other and lawful adventure was intended by the assured, then, admitting the subscription to have been an innocent act on his part, there will be no consideration at all to support his present demand." On the other hand the insured under a policy large enough to cover an illegal adventure, and where an illegal adventure is in fact intended, is not entitled to sue for recovery of the premium, on the ground that the adventure has never been entered on. *Palyart v. Leekie* (1817), 6 M. & S. 381, 18 R. R. 381. The decision was placed partly on the ground that the plaintiff had given no notice of abandoning the contract; but the judgments tend to the view that he could not have recovered in any case.

"A policy on an illegal voyage cannot be enforced, for it would be singular, if, the original contract being invalid and therefore incapable of being enforced, a collateral contract founded upon it could be enforced. It may be laid down, therefore, as a general rule, that where a voyage is illegal, an insurance upon such voyage is invalid. Thus during the war, policies effected on vessels sailing in contravention of convoy Acts were held void. So, where the voyage was against the provisions of the East India Company Acts, or the South Sea Company Act, or the General Navigation Act, which statutes were made with reference to the general policy of the realm." Per TINDAL, Ch. J., in *Redmond v. Smith* (1844), 7 M. & Gr. 457, 474.

The illegality alleged in *Redmond v. Smith*, however, was that the ship sailed without an agreement in writing made with the master and seamen according to the provisions of the then Merchant Shipping Act, 5 & 6 Will. IV., c. 19, ss. 4 *et seq.* (see now Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, ss. 113 *et seq.*). And it was held that the non-compliance with this provision did not render the voyage or the insurance illegal. Upon this, TINDAL, Ch. J., said:

“It appears to me that the 5 & 6 Will. IV., c. 19, was passed for a collateral purpose only; its intention being to give to merchant-seamen a readier mode of enforcing their contracts, and to prevent their being imposed upon. The present case is undoubtedly brought within the provisions of the statute [which] enacts [by s. 4] that if the master do not comply with the previous requisitions, he shall be liable to a penalty; but it is nowhere said that such non-compliance shall make the voyage illegal; the section merely provides a remedy against the master. Neither can I consider this as a case of unseaworthiness. The cases cited were cases in which there was an incompetent crew; but there is nothing here to show that the crew was not both sufficient and competent.” This reasoning applies to the modern Act as well, unless it makes a difference that in the case of a home-trade ship the owner is likewise liable to a penalty.

On the contrary, where the statutory requirements are imposed in the interest of the public generally, or as part of the commercial policy of the Empire, non-compliance, with the privity of the insured, avoids the policy. So where a ship sailed with deck cargo, carried in contravention of the Customs Consolidation Act, 1853, 16 & 17 Vict., c. 107, s. 171 (see now the Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, s. 451), it has been held that a person insuring goods on board, with the knowledge of the intention to contravene the Act, could not recover on his policy. But, to make good the defence of illegality, the privity of the insured to the contravention of the Act must be shown. *Cunard v. Hyde* (1858), El. Bl. & El. 1, 27 L. J. Q. B. 408 (1859), 2 El. & El. 1, 29 L. J. Q. B. 6; *Wilson v. Rankin* (1865), 34 L. J. Q. B. 62, 11 Jur. (N. S.) 173, 12 L. T. 20, 13 W. R. 404, 6 B. & S. 208 (affirmed on appeal, 35 L. J. Q. B. 203, 13 L. T. 564, 14 W. R. 198). The same was the case in regard to a ship sailing contrary to the convoy Act in force during the war with France. *Metcalf v. Parry* (1814), 4 Camp. 123, 15 R. R. 734. And so as to a vessel carrying passengers without being certificated, in contravention of the Merchant Shipping Acts. *Dudgeon v. Pembroke* (1874), L. R. 9 Q. B. 581, 1 Q. B. D. 96, 43 L. J. Q. B. 220. See on similar questions, *Johnson v. Sutton* (1779), Dougl. 254; *Parkin v. Dick*, *supra*; *Camelo v. Britten* (1820), 4 B. & Ald. 184; *Gibson v. Service* (1814), 5 Taunt. 433, 15 R. R. 541.

If the contract for the voyage is capable of being carried out without a breach of the law, the intention to break the law is a necessary element in order to make the contract — and therefore the collateral contract of insurance — illegal. *Waugh v. Morris* (1873), L. R. 8 Q. B. 202, 42 L. J. Q. B. 57, 28 L. T. 265, 21 W. R. 438. The question there arose out of a charter-party to carry hay from a port in France to

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London, and to be taken from ship alongside. The agent for the charterer verbally told the master that the consignees would require the hay to be delivered at a particular wharf, and to this the master assented. Neither party knew that, as the fact was, the landing of the hay would have been contrary to an existing order in council under the Contagious Diseases (Animals) Act, 1869. In an action by the shipowner for detention of the ship, it was held that he was not precluded from recovering. BLACKBURN, J., in delivering the judgment of the Court, said (L. R. 8 Q. B. 207): "We agree that a contract, lawful in itself, is illegal if it be entered into with the object that the law should be violated; if, as it is expressed in *Pearce v. Brooks*, L. R. 1 Ex. 213, it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *McKinnell v. Robinson*, 3 M. & W., at p. 442, 'for the express purpose of a violation of the law.' But in the present case the shipowner never did even contemplate or believe that the defendant would violate the law. He contemplated that the defendant would land the goods which he thought was lawful; but if he had thought at all of the possibility of the landing being prohibited, he would probably have expected that the defendant would in that case not violate the law. And he would have been right in fact in that expectation, for the defendant did not attempt to land the goods. We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance."

There is nothing invalid, from the point of view of one State, in a contract in breach of the revenue laws of another State. And consequently, from the point of view of the latter State, an insurance on a voyage for any such purpose is not illegal. See per Lord MANSFIELD in *Lever v. Fletcher*, Park, Insur. *Planché v. Fletcher* (1779), 1 Dougl. 251, 253.

The right given by the law of nations to a belligerent to seize contraband of war does not make it illegal, from the point of view of a neutral State, for a subject of that State to engage in a voyage for supplying contraband of war to one of the belligerents. *Ex parte Chacasse*, *In re Grazebrook* (1865), 34 L. J. Bank. 17, 11 Jur. (N. S.) 400, 12 L. T. 249, 13 W. R. 627. The principle as laid down by Lord WESTBURY in that case must now by the law of this country be regarded as limited by the more stringent provisions of the Foreign Enlistment Act, 1870 (33 & 34 Vict., c. 90), which (*inter alia*, ss. 8-10)

prohibits the building or equipment of a ship for the military or naval service of a foreign State at war with a friendly State.

On the same principle, it does not appear to have been doubted that the enterprise of a blockade-runner is lawful from the point of view of the neutral State whose subjects are engaged in it. So that neither the carrying of contraband, nor the intention to run a blockade, will invalidate an insurance, provided that the nature of the adventure, so far as relates to the risk, is fully disclosed. See Arnould on Insurance, 6th ed., p. 713.

AMERICAN NOTES.

Potts v. Bell is cited in 1 Parsons on Marine Insurance, p. 19; Duer cites both cases repeatedly; Biddle cites *Potts v. Bell* (1 Insurance, p. 487); May cites *Potts v. Bell* (2 Insurance, sect. 350). *Bird v. Appleton* is cited in 14 Am. & Eng. Enc. of Law, p. 374, with the observation as to illegal voyages: "This principle is established beyond all question. The principal difficulty has arisen in deciding whether or not a particular act or trade were in fact illegal." "In the United States the cases have arisen chiefly upon warranties against illegal traffic."

In *Kemble v. Rhineland*, 3 Johnson Cases (N. Y.), 130, KENT, J., said: "The unlawful trade that Mackey and his vessel might have been engaged in formerly could not vitiate or poison a subsequent lawful traffic. The penalty of forfeiture could attach only during the existence of the illegal trade; the moment that was abandoned, Mackey resumed his neutral character and privilege. A contrary decision would be excessively embarrassing and mischievous, and is wholly inadmissible."

Mere sailing under an enemy's license, without regard to the object of the voyage, avoids the policy. *Colquhoun v. N. Y. F. Ins. Co.*, 15 Johnson (N. Y.), 353, citing the decisions of the United States Supreme Court.

A state of war renders unlawful all intercourse between their subjects. *Prize Cases*, 2 Black (U. S. Sup. Ct.), 687; *Kershaw v. Kelsey*, 100 Massachusetts, 561; 1 Am. Rep. 142; 97 Am. Dec. 124; *Cohen v. N. Y. M. L. Ins. Co.*, 50 New York, 612; 10 Am. Rep. 622, a case of life insurance, distinguishing *Potts v. Bell* as a case of insurance on merchandise.

A policy on a voyage forbidden by the law of the underwriter's country is void. *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason (U. S. Circ. Ct.), 6. But not so if the voyage is forbidden only by the laws of another country, as for example, trade by a neutral in goods contraband of war. *Skidmore v. Desdoity*, 2 Johnson Cases (N. Y.), 77; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S. Sup. Ct.), 506; *Decrow v. Waldo M. Ins. Co.*, 43 Maine, 460.

No. 31. — *Usparicha v. Noble*, 13 East, 332, 333. — Rule.No. 31. — *USPARICHA v. NOBLE*.

(1811.)

RULE.

ALTHOUGH by the law of England a contract of insurance on property of an alien enemy is illegal, yet where a certain trade with the enemy's country is carried on under the King's license, such trade is legalised for all purposes; and the property in goods engaged in such trade may be insured by the shipper in this country either in his own name or as agent for the consignee who is an alien enemy.

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13 East, 332-343 (12 R. R. 360).

Insurance. — Property of Alien Enemy. — King's License.

A native Spaniard domiciled here in time of war between this country and [332] Spain, having been licensed in general terms by the King to ship goods in a neutral vessel from hence to certain ports of Spain, such commerce is legalised for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country; and such goods may, therefore, be insured by him, either on his own account, or as agent for them: and he may sue and recover upon the policy in his own name in case of a loss by capture; and this, though the prize, which was taken by a French privateer (France being a co-belligerent with Spain in the war, and both governments having issued similar decrees against British commerce), was afterwards condemned by a French consular Court then sitting in a port of Spain, into which the prize was carried: for in respect of the purposes of such licensed trading the subjects of Spain concerned in it are to be regarded as British subjects.

This was an action on a policy of insurance on fish on board the Prussian ship *Carlota*, at and from Poole to St Andero and Bilboa, both, or either, subscribed by the defendant for £150, on the 29th February, 1808, a copy of which policy was annexed to this case. The declaration contained three counts: in the first, the interest was averred * to be in Lemona Uria and Fran- [*333] cis Joze de Uriarte; in the second, in the plaintiff and F. J. de Uriarte; and in the third, in the plaintiff alone: and the loss was alleged to be by capture. At the trial at the Sittings

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after last Michaelmas Term at Guildhall before Lord ELLENBOROUGH, Ch. J., a verdict was found for the plaintiff for £137 10s., subject to the opinion of the Court upon the following case:—

The plaintiff is a Spaniard by birth, but has been domiciled as a merchant in this country for the last eight years. In February, 1808, the plaintiff purchased¹ 5400 quintals of fish, and shipped the same in the Prussian ship the *Carlota* for St. Andero, in consequence of orders from the agent of Mr. Lemona Uria, a merchant resident in Bilboa, and Mr. Uriarte, a Spanish gentleman resident at Vera Cruz in Spanish America, but who was in England at the time of the purchase and shipment, upon a temporary occasion. Mr. Lemona Uria was interested in the cargo in the proportion of 5-8ths, and Mr. Uriarte in the proportion of 3-8ths. The plaintiff has received payment from Mr. Uriarte, but not from Mr. Lemona Uria. On the 21st of December, 1807, the British government granted a license for the ship *Carlota* with her said cargo to proceed on the voyage in question. By the decrees of the French and Spanish governments at the commencement of the war with Great Britain, all ships and goods coming from England were declared lawful prize. The *Carlota* sailed from Poole on the 28th of February, 1808; and while in prosecution of her voyage was captured (without the limits of the ports of St. Andero [* 334] or * Bilboa) by two French privateers belonging to Bayonne, and was carried into Castro, a port of Spain, where the ship and cargo were condemned and sold by the sentence of a French consular Court, held in Spain, on the 8th of June, 1808. At the time of the capture and condemnation France and Spain were co-belligerent allies at war with this country. The question was, whether the plaintiff were entitled to recover? If he were so entitled, the verdict was to stand: if not, then the verdict was to be set aside and a nonsuit entered. The policy referred to was in the common printed form, and was stated to be made by the plaintiff, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, should, or might appertain, for himself and them and every of them, at 10 guineas per cent; and liberty was reserved for the ship “to have any clearances and carry any simulated

¹ It was agreed in the course of the argument that the goods were purchased and shipped by the plaintiff, on account of his correspondents, and not on his own account.

No. 31. — *Usparicha v. Noble*, 13 East, 334–340.

papers;" and also it was "lawful for the said ship in the voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever to load, unload, and reload goods, without being deemed a deviation." At the conclusion the insurance was stated to be "£1000 on 5400 quintals of fish valued at £6000, warranted free of seizure in the ports of Bilboa and St. Andero; to pay a loss within two months after such detention, without waiting for condemnation or restitution." And the King, by his license referred to, reciting that, "whereas Manuel de Munoz y Usparicha (the plaintiff) hath humbly represented to us that he is desirous of obtaining our royal license for permitting the Prussian ship *Charlotte*, M. F. J., master, of about 300 tons burthen, to proceed from Poole to Bilboa or Santander, with a cargo of fish and such goods as are permitted * by [*335] virtue of our order of the 11th of November, 1807, to be exported," thereby directed the commanders of all his ships of war and privateers "not to interrupt the said vessel, but to suffer her to proceed as aforesaid." This license was to remain in force for four months, and at the expiration thereof, or sooner if the voyage were before completed, was to be deposited with the commissioners of the customs at the port of London, or with the collector of the customs at the outports. Dated 21st December, 1807.

Barnewall for the plaintiff. . . .

Richardson, *contra*. . . . [337]

Barnewall in reply. . . . [339]

Lord ELLENBOROUGH, Ch. J. (After stating the facts): —

It appears by the case that this was an action brought by [340] a native Spaniard domiciled here in time of war with Spain, and specially licensed by His Majesty for the purpose of the very commerce which it was the object of the policy declared upon in this action to insure. The case cited of *Wells v. Williams*, 1 Lord Raym. 282, establishes that a plaintiff, an alien enemy in respect of the place of his birth, may, under similar circumstances of domicile, be allowed to sue in our courts. The legal result of the license granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our Courts of law, but that the commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the Crown. The Crown

No. 31. — *Usparicha v. Noble*, 13 East, 340-342.

may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war; and its license for such purpose ought to receive the most liberal construction. To say that the plaintiff might export the goods specified in the license from Great Britain to an enemy's country for the benefit of himself or others (and the license contains no restriction in this particular); and yet to hold that where he has so done he could not insure, or, having insured, could not recover his loss, either on account of his original character of a native Spaniard, or on account of the places [* 341] to which, or of the persons to whom the goods *were destined, — would be to convert the license itself into an instrument of deception and fraud. The Crown, in licensing the end, impliedly licenses all the ordinary legitimate means of attaining that end. For adequate purposes of State policy and public advantage, the Crown, it must be presumed, has been induced in this instance to license a description of trading with an enemy's country, which would otherwise be unquestionably illegal. Whatever commerce of this sort the Crown has thought fit to permit (which in respect of its prerogatives of peace and war the Crown is by its sole authority competent to prohibit or permit) must be regarded by all the subjects of the realm, and by the Courts of law, when any question relative to it comes before them, as legal, with all the consequences of its being legal: one of which consequences is a right to contract with other subjects of the country for the indemnity and protection of such property in the course of its conveyance to its licensed place of destination, though an enemy's country, and for the purpose (as it probably will be in most cases) of being there delivered to an alien enemy as consignee or purchaser. In the present case the license was obtained for the purpose of protecting the subject-matter insured in the course of its conveyance by sea from England to certain ports in Spain, to be there delivered to the purchasers thereof, who are the persons in whom the interest is averred in the first and second counts of this declaration; and the action is well brought, upon the principles above stated, in the name of the plaintiff for their benefit. For the purpose of this licensed act of trading (but to that extent only), the person licensed [* 342] is to be regarded as virtually an adopted *subject of the Crown of Great Britain; his trading, as far as the disa-

No. 31. — *Usparicha v. Noble*, 13 East, 342, 343. — Notes.

bilities arising out of a state of war are concerned, is British trading; and of course any argument to be drawn from a virtual participation in and supposed privity to the acts of his own native country, then at war with the Crown of Great Britain, is excluded or superseded in point of effect by an express privity to and immediate participation in the adverse acts of the British government. As far as the plaintiff and the Spanish purchasers of this cargo are concerned, they are actually privy to the objects of the British government, and acting in furtherance thereof, and in direct opposition to the laws and policy of their own country. And it will not be contended to be illegal to insure a trade carried on in contravention of the laws of a State at war with us, and in furtherance of the policy of our country and its trade; and which this trade in question, sanctioned as it is by His Majesty's license, must be deemed to have been. It is not therefore necessary to consider upon this occasion the ingenious superstructure which has been endeavoured to be raised on the determination of this Court in the case of *Conway v. Gray*, 10 East, 536. Nor (if the principle of that case did at all apply to the present, circumstanced as it is in consequence of His Majesty's license) how far its operation might be restrained or affected, as has been argued by the particular provision in this policy, that, "in case of capture, seizure, or detention, the underwriter should pay a loss within two months, without waiting for condemnation or restitution." All these points are immaterial, with a view to the judgment upon this case, provided the property insured be in virtue of the King's license, * for the purpose of the insurance, to be [* 343] considered as fully legalised: and we are clearly of opinion that it ought to be so considered. *Judgment for the plaintiff.*

ENGLISH NOTES.

The principle upon which the validity of such a license depends is well expressed in Arnould on Insurance, 6th ed., p. 706, as follows: "The executive power of the State, being the sole and supreme arbiter of all questions relating to peace and war, may grant to such of its subjects as it pleases any privilege or license to trade with the enemy, or to hostile ports, on any terms and for any period that may appear expedient."

The principle is illustrated by the cases cited in the notes to *Potts v. Bell*, 2 R. C. 668; and also by the case of *Spitta v. Woodman*, No. 32, p. 569, *post*.

No. 32. — *Spitta v. Woodman.* — Rule.

AMERICAN NOTES.

This case is cited in 1 Duer on Insurance, p. 606, and in 1 Parsons on Marine Insurance, p. 21.

In *Bulkley v. Derby Fish. Co.*, 1 Connecticut, 571, it was held that trade to a neutral port was protected by a license through the minister of the neutral power, the Court contending that there was no intercourse or contract with the enemy. But this is deemed by Mr. Parsons not in conformity with the decisions (cited in the last note), prohibiting sailing under an enemy's license. In *Hayward v. Blake*, 12 Massachusetts, 176, it was held that a British enemy's license on a ship bound to a neutral port did not avoid the insurance. A subsequent British enemy's license was held not to render illegal a charter-party for a valid voyage. *Ogden v. Barker*, 18 Johnson (N. Y.), 87.

SECTION V. — *Inception and Duration of the Risk.*No. 32. — *SPITTA v. WOODMAN.*

(C. P. 1810.)

No. 33. — *BELL v. HOBSON.*

(K. B. 1812.)

RULE.

IF a policy be effected on goods on a voyage from A. to B., the risk to commence at and from the loading thereof on board, it is *primâ facie* intended that the loading is to take place at A.

But this construction yields to an expression indicating that a prior loading was contemplated. And where the policy is expressed to be in continuation of a former policy, which was on goods shipped at a port (X.) from which the ship previously started, the goods will be covered from A. to B. although shipped at X.

Spitta v. Woodman.

2 Taunt. 416-427 (11 R. R. 628).

Insurance. — Goods on Voyage. — Inception of Risk.

If a policy be effected on goods on a voyage defined from A. to B., the [416] risk to commence at and from the loading thereof on board, not saying where, it must be intended a loading at the place from which the voyage commenced. And if the proof be that the goods were loaded in an earlier part of the ship's course, and before her arrival at the place where the voyage insured commences, the plaintiff cannot recover; though the same underwriter had insured the same goods for the anterior voyage, and knew the second policy was effected thereon.

If a license is obtained, giving a neutral wider scope than the exceptions and conditions in the orders of council give, and not referring thereto, he may avail himself of the privileges conferred by the license, and is not confined by the restrictions contained in those orders.

Therefore, where the 5th article of the order of council of 11th November, 1807, legalises the exportation of colonial produce by neutrals clearing out from this kingdom under such regulations as His Majesty shall think fit to prescribe, which shall be proceeding direct to the port specified in their clearance, and the license authorised the vessel to proceed to Sweden or any port in the Baltic, though the clearance obtained named only Gottenburgh, the Court held that the license authorised the vessel to proceed to Pillau, a port in the Baltic.

This action was brought to recover a total loss on two policies of insurance effected on the ship *Daniel and Frederick*, "at and from Gottenburgh to her first port of discharge in the Baltic, not higher than Riga," on specific goods, valued, "at a premium of 35 guineas per cent to return 10 per cent for convoy, and 5 per cent more for arrival;" beginning the adventure upon the said goods from the loading thereof on board the said ship (not saying where). Upon the trial of this cause at the Sittings after last Michaelmas Term at Guildhall, before MANSFIELD, Ch. J., it appeared that the vessel was an American, belonging to Philadelphia; on the 1st of April, 1808, she sailed from London, having there received on board a cargo of coffee, raw sugar, and indigo, bound for Gottenburgh, and some port in the Baltic, situated between Lubeck and Riga, and arrived safe at Gottenburgh. Insurances had previously been effected upon the cargo, from London to Gottenburgh only, at a time when it had not been determined to what port the ship should ultimately proceed; but it being at length fixed that she should sail to some port in the Baltic, and there discharge her cargo, the insurance in question was effected. Upon * the ship's arrival at [* 417]

Gottenburgh, the port of Pillau was assigned to the master as his port of discharge. His cargo was not taken out and reladen at Gottenburgh, he sailed from thence with convoy, and upon his arrival in Pillau Roads, while he was engaged on shore in exhibiting the ship's papers, for the purpose of procuring her admittance into the port, his vessel was captured by a French privateer. The defendant having insured the same goods on the former policy from London to Gottenburgh, was fully aware, when the policy upon the further risk "from Gottenburgh to her first port of discharge in the Baltic" was presented to him, that he was insuring the same goods as were described in the former policy. The defendant admitted his subscription, and the plaintiff's interest. It being conceived, and admitted at the trial, that a license was necessary for this voyage, the plaintiff gave in evidence an order for a license issued by the Privy Council, and a license granted in consequence thereof, "for permitting the American ship *Daniel and Frederick* to proceed from any port in the United Kingdom, to Sweden, or any port in the Baltic, with a cargo of such colonial produce as was allowed by His Majesty's order in council of the 11th of November, 1807, and having discharged the said cargo, then to take on board, either at the said port of discharge, or at Gottenburgh, or any other port of the Baltic, a cargo of such goods as were allowed by virtue of the aforesaid order to be imported, and to proceed with the same to any port of Great Britain." The license also contained a provision, "that if it should be found necessary for the ship to proceed from the port of delivery to any other port of the Baltic, for the purpose of taking on board a return cargo, she should be permitted to proceed to such port in ballast only." Signed Hawkesbury. The ship's clearance [418] from London did not mention any port of destination except Gottenburgh, which is not a port in the Baltic. The declaration averred, that on the 8th of May the ship in the policy mentioned, with the goods in the policy mentioned on board thereof as aforesaid, was in good safety at Gottenburgh aforesaid, to wit, at London, and afterwards sailed from Gottenburgh. For the defendant it was objected: 1. That the loading thereof on board, mentioned in the policy, must mean a loading thereof at Gottenburgh, that being the only port or place mentioned in the policy, and that then, inasmuch as it appeared in evidence that there were no goods laden at Gottenburgh, but that the goods

described in the policy were laden in London, either the risk never attached, or if the declaration intended to aver a loading at Gottenburgh, there was a fatal variance. Secondly, the defendant relied on the order in council of 11th November, 1807, by which it is ordered that all ports and places in Europe, from which, although not at war with His Majesty, the British flag is excluded, and all ports or places in the colonies belonging to His Majesty's enemies, shall from thenceforth be subject to the same restrictions in point of trade and navigation, with the exceptions thereafter mentioned, as if the same were actually blockaded by His Majesty's naval forces in the most strict and vigorous manner. But by the fifth article nothing herein contained is to extend the liability to capture and condemnation to any vessel, or the cargo of any vessel, belonging to any country not at war with His Majesty, which shall have cleared out from some port or place in this kingdom, or from Gibraltar or Malta, under such regulations as His Majesty may think fit to prescribe, or from any port belonging to His Majesty's allies, and shall be proceeding direct to the port specified in her clearance. The defendant contended that these orders were explained by the additional instructions to cruisers, issued by the Privy Council on the 26th of November, 1807, in pursuance of an order of council made on the preceding day, and [419] directing that vessels belonging to any State not at war with His Majesty, laden with cargoes in any ports of the United Kingdom, and clearing out according to law, shall not be interrupted or molested in proceeding to any port in Europe (except ports specially notified to be in a state of strict and vigorous blockade before His Majesty's order of the 11th of November then instant, or which shall be thereafter so notified), to whomsoever the goods laden on board such vessels may appear to belong. And he contended that inasmuch as the *Daniel and Frederick* had not obtained a clearance from London specifying any other port of destination than Gottenburgh, she had not cleared out according to law, and therefore was not within the exception contained in the additional orders of 26th November, and that consequently the adventure fell within the general prohibition contained in the first article of the order in council of the 11th of November. MANSFIELD, C. J., considered this last objection as unanswerable, but reserved both points, subject to which he permitted the case to go to the jury, who found a verdict for the plaintiff.

Accordingly, Lens, Serjt., in Hilary Term having obtained a rule *nisi* to set aside the verdict and enter a nonsuit,

Shepherd and Best, Serjts., on a former day in this term showed cause. It is allowable to call in aid the other documents issued by the government, in order to explain their own acts; and this meaning results from the whole of them; that if, when a ship sails, she clears out for a port of Europe, not then in a state of actual vigorous blockade, she shall not be molested by our cruisers. If no ship

could clear out according to law, unless her ultimate destination be expressed in her clearance, then no trading voyage is

[420] legal, for until the ship finds a market for her cargo, her ultimate destination cannot be known; or if it be in some cases known, the universal practice is not to mention it in the clearance. Besides, the clearance mentioned in the fifth article does not exclusively refer to a clearance from a port of this kingdom, for the exception is extended to ships clearing out from any port belonging to His Majesty's allies: it is the clearance from the port of Gottenburgh, therefore, which is to be considered. The license itself is an order of His Majesty in council, of equal authority with any other act of His Majesty in council: coming after the order of the 11th November, it supersedes it as to this cargo: it refers to the former orders in council for no other purpose than for the specification of the sort of goods which it authorises to be imported, and to enumerate the excepted goods; but it adopts no other regulations therein contained. The license does not require the intended voyage to be stated in the clearance, but on the contrary it contemplates a different voyage from that mentioned in the clearance; and when this license, therefore, is coupled with the instructions given to His Majesty's cruisers, the effect of both united is an express permission for the vessel to proceed to Pillau. It is not as if an Act of Parliament had declared that the King's prerogative should be limited to granting licenses to vessels under certain exceptions: the King may license an adventure to a port in actual blockade, if he will: a declaration of war is an order of council; but it does not prevent the King from granting licenses to trade with the enemy. [MANSFIELD, C. J. — This point is very important; for the intent of a license is to render legal that traffic which was before illegal; and how does it less operate on that which was rendered illegal by the effect of these particular orders of

[421] council, than on that which was illegal by a general

No. 32. — *Spitta v. Woodman*, 2 Taunt. 421, 422.

declaration of war? What is there, then, in the orders of council to prevent this subsequent license from legalising the traffic therein mentioned? Or how do the orders render that traffic more than illegal?] Nothing is therein said about any necessity of obtaining a license. The object of them was to encourage merchants in a hazardous branch of trade, by declaring the principles on which the government intended to proceed, whereas the doctrine contended for would throw insurmountable difficulties in the way of this trade, by rendering it necessary either to mention in the clearance the name of every port in Sweden and the Baltic; or if only one is mentioned, the adventurer must be confined to that one, which is clearly contrary to the intentions of government. The only question, therefore, is, whether this license embraces the voyage; and as it is a license to Gottenburgh or any port in the Baltic, of which description Pillau is, it clearly does; and since the voyage is governed not by the rules prescribed by the former orders in council, but by the laws prescribed by the King in this particular case, the license produced is a sufficient authority for the voyage insured. As to the other point, this case is distinguishable from that of *Robertson v. French*, 4 East, 130 (7 R. R. 535), which was “on the goods, from the loading thereof on board the said ship, at all and any port on the coast of Brazil;” and the goods lost were loaded at the Cape of Good Hope. [LAWRENCE, J. — The case there was, that the goods were shipped from the Cape for Brazil: a policy had been effected on the outward cargo for a time, which had expired: the policy subscribed by the defendant had been intended to attach on the (see *post*, p. 575, and 1 Marshall on Insurances, 2nd ed., 323) homeward-bound cargo; but the ship not being able to find a market, after a time, returned with the same goods to the Cape, and it was held that the second policy did not attach thereon.] There the outward *voyage [*422] had ended: these are policies on the outward voyage which is continuing at the time of the loss. *Hodgson v. Richardson*, 1 Bl. Rep. 463. The policy was at and from Genoa to Dublin, the adventure to begin from the loading to equip for this voyage. The cargo had been loaden at Leghorn, of perishable commodities, more than five months before: the objection was there never thought of, that because the goods were not put on board at Genoa, the risk would not attach, but the underwriter was discharged on the ground of a fraudulent concealment of the time and place of lading, making

it appear to the underwriter that he was insuring new fresh goods instead of an old damaged cargo; the Court holding that it is, or in many cases may be, material whether the loading is at the port mentioned or at another. In this case the time and circumstances of the loading on board at London were fully known to the defendant: that case, therefore, is so far favourable to the plaintiff. The words of this policy are those which are usually inserted, without any alteration, in cases where it is known that the goods are not loaded at the port mentioned in the policy, but long before: the meaning of them is, beginning the adventure on the goods, while they are on board. It is doing no great violence to the words of the policy to construe it "beginning the risk at Gottenburgh, on goods found on board the ship at her arrival here."

Lens and Marshall, Serjts., *contra*. — As to the last point, the question is not whether the parties might have made another policy on this adventure which should have been valid, but what is the true construction of the present policy. The risk runs from the loading. Where then, and at what time, were they loaded? Not

at Gottenburgh, upon the ship's arrival there, but in Great [* 423] Britain many weeks before; but the policy implies * that

they were loaded at Gottenburgh, which is inconsistent with the fact. But the fact is very material to the risk: for the principal danger apprehended was of the French confiscating by force all goods put on board in Great Britain; if the goods had really been laden at Gottenburgh all would have been right and legal: the ship would then have carried real papers instead of simulated papers. Even if the goods had been barely landed, and reshipped at Gottenburgh, so as to entitle the vessel to these papers, perhaps the Court might have supported the plaintiff's claim. [LAWRENCE, J. — Suppose the insurance had been "beginning the adventure on the merchandises from the loading thereof on board at the port of London," the voyage being from Gottenburgh, as now, would you not then understand the risk to be on goods laden at London, on the voyage from Gottenburgh to the ship's port of discharge in the Baltic?] If another sufficient averment had been introduced, and the Court could see the whole on the record, they would restrain the effect of the policy from the time of the ship's departure from London to the time of her arriving with the goods at Gottenburgh; but there is no inference to be drawn on the present record as to which of these two inconsistent

averments shall stand. Therefore the defendant's case is not at all dependent on the case in *Blackstone*. It is true the defendant had knowledge of the destination of the goods; but that does not enable the plaintiff to state one case, and to recover upon the proof of another. He alleges the goods to be put on board at Gottenburgh, and proves them to be put on board in London. [MANSFIELD, Ch. J. — I think with you, the goods might have been landed and reshipped, and that is not a mere form: for, in a certain degree, the parties can judge from the outside of the packages whether, up to that time, any damage has been sustained; and without such examination, if an average loss should arise, it * would be almost impossible to determine whether it [* 424] was sustained before the ship's arrival at Gottenburgh, or afterwards. So far the case of *Hodgson v. Richardson* is still applicable: the terms of the policy in that case are much like these, except that it has the words "to equip for the voyage," which seem to indicate an intention of fraud.] Perhaps, as the Court rested so much on the ground of concealment in that case, it may be fair to consider the present question as untouched by it; but the case of *Robertson v. French* bottoms itself upon the principle, that as the goods were not put on board at the coast of Brazil, but at the Cape of Good Hope, the adventure made was not the adventure described in the policy. [HEATH, J. — Did not that case proceed on the ground that it was not the intention of the parties to insure that voyage?] It was no otherwise against their intention than as their intention was to be collected from the words of the policy; but in fact they designed it as a continuation of the risk on that particular cargo, the same underwriter having before insured the goods for a time, which expired on the 17th of September, the same day on which this risk had its inception; contrary to what was thrown out by LAWRENCE, J., respecting it, above (p. 421), and upon the argument in the case of *Grant v. Paxton*.¹ The Court, in *Robertson v. French*, said, you shall not apply your policy, whatever you intended in fact, to an adventure which is not described therein. To pursue this rule will generally attain the purposes of justice; but if it should ever be the parties' intention to insure a voyage which they do not describe, it becomes necessary, according to the plaintiff's argument, that the risk should

¹ This observation is not contained in the report of that case. 1 Taunt. 463 (10 R. R. 583).

attach on the goods in the state they are in on the day of effecting the policy. That rule must be radically wrong: it cannot [* 425] be, that because the party signs a policy on the * first of March, it shall apply to a transaction to which it would not apply if signed on the first of May. Since, therefore, the policy legally and by necessary interpretation describes a voyage, and a commencement of the adventure, different from that set forth in the declaration, the plaintiff cannot recover. As to the other point, the answer given goes beside the objection. It is not yet clear that this ship needed any license for her voyage; and the unnecessarily taking a license where none was necessary will not put the party in a better situation, nor entitle him to a greater latitude than if he had taken none. This is a license couched in the most general terms, for the ship *Daniel and Frederick* to bring home produce under the restrictions therein referred to. It is not a license dispensing with the orders in council; on the contrary, it founds itself thereon, and does not at all impugn them unless it can be shown that the party could not have the full benefit of this license, without its superseding those orders. Nothing hinders that the plaintiff may both obey those orders and have the benefit of the license at once. But allowing that the license imposes on the plaintiff further restrictions in the prosecution of this trade, that does not excuse him from also bringing himself within the exceptions made in the orders of council, unless the license plainly and expressly dispenses with them, which it does not. The plaintiff, therefore, has not at all advanced his argument, for the defendant rests on the ground that this is all consistent with and consequent on the orders in council. But if the license be inconsistent with them, it is assuming far too much to say that a single Secretary of State, who issues this license, has authority to supersede the orders in council; and unless proof is exhibited of his having had such an authority committed to him, the Court will rather hold the license void, as militating against an existing [426] edict. [MANSFIELD, Ch. J. — The license provides that the ship might proceed, if necessary, from her port of delivery to any other port in the Baltic, for the purpose of taking in a return cargo in ballast. In availing himself of that permission, it is impossible for her to comply with that part of the order in council which directs that the ship shall pass unmolested only if she shall be proceeding direct to her port of clearance. That order

could not apply to a ship which had a general license to go where she pleased, but only to ships which are proceeding to some one known port of destination. It is only necessary for the person applying for a license to state to the Secretary of State what voyage he intends ; and when that is explained, the council gives a general license in terms large enough to comprehend those parts which cannot be determined on.] That provision does not apply to the present case, nor show that the ship was not, for the purposes of this adventure, within the operation of the orders in council : that is a provision for a subsequent period of the voyage, after she shall leave her port of delivery, the clearance, which it is contended the orders in council require, is a clearance from this country to her port of delivery ; if she had had this, she might then perhaps have taken benefit of the provision in the license for the ulterior voyage. The orders in council, therefore, as well as the license, are both applicable, and both to be observed ; if there had been no orders in council the King might have licensed the ship just in the same manner. [MANSFIELD, Ch. J. — If there had been no orders in council, no license at all would have been necessary for this voyage.] This license is nothing more than a consequence of the orders in council. The plaintiff might at least have stated in the clearance that the vessel was bound to Gottenburgh, and to her further port of discharge in the Baltic ; for though he could not ascertain whither she was going, he could state that she was going beyond Gottenburgh. The matter about which the [427] Crown is solicitous is, whither the goods are going ; and the plaintiff names Gottenburgh, not because the goods are really going there, but for the sake of touching there to get simulated papers. It is therefore a very material variance, or rather a concealment of that which the Crown requires to be disclosed, if a false clearance like this is taken out, which is to expire before the ship comes on the essential part of her voyage, so that she sails in effect without any clearance at all, for her port of discharge : whereas, the orders of council, which are not at all contravened by the license, but which, together with the license, form the condition under which she is to sail, expressly require a clearance, not a fictitious clearance, but a clearing out according to law ; and both codes must be made to stand together, unless it appear by positive terms that the latter was intended to repeal the former.

MANSFIELD, Ch. J. — Those words “ according to law ” are of no
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effect, for if they had not been inserted they would have been implied. It is possible that the freighters might know before the ship sailed that she was going to Pillau Roads, but it is more probable that they meant rather to be guided by circumstances, and to confer with their correspondents when the vessel arrived at Gottenburgh. It is clear that the general orders in council, if complied with by a neutral ship, render all license unnecessary. And this license has no other reference to the orders in council than to define the species of goods licensed, by describing them to be the same which are authorised by those orders to be exported: it has no reference to any conditions with which a trader is bound to comply. The very purpose of inserting the name of the port of delivery in the clearance is satisfied and done away by the application made to government for this license; for in so applying, [428] the communication is made to government, which they wish:

in that license the port is expressed, so far as it can be expressed; and it seems to have been the intention of the parties to reserve an option as to the ultimate port of discharge. The license is not at all founded on the orders of council, but on the general power of the Crown.

LAWRENCE, J., in confirmation of this proposition, read the relevant part of the license. *Cur. adv. vult.*

The Court, on this day, decided that there was no ground for the last-mentioned objection, the license being sufficient; but, on the other ground, they felt themselves obliged to make the rule for entering a nonsuit *Absolute.*

Bell v. Hobson.

16 East, 240-243 (14 R. R. 337).

Insurance. — Goods on Voyage. — Inception of Risk.

[240] Policy on goods at and from G. to any port in the Baltic, beginning the adventure from the loading thereof on board the ship; and the policy was declared to be in continuation of a former policy, which was a policy from V. to her port of discharge in the United Kingdom, or any ports in the Baltic, with liberty to take in and discharge goods wheresoever, to return 12 per cent if the voyage ended at G. *Held*, that the assured were entitled to recover, although the goods were not loaded on board at G. but at V., and although the defendant was not an underwriter on the former policy.

This was an action on a policy of insurance on goods, tried before Lord ELLENBOROUGH, Ch. J., at Guildhall. The policy was effected on the 15th of June, 1810, “at and from Gottenburgh to any port or ports, place or places, in the Baltic, backwards and forwards, and forwards and backwards, with leave to seek, join, and exchange convoy, carry, use, and exchange simulated papers, clearances, and ship’s papers, touch at all ports, places, and islands, for all purposes whatsoever, take in and discharge goods wherever the ship may touch at, including * risk in crafts, [* 241] &c. and transshipment, &c. If not allowed to enter any ports or discharge the cargo, &c., to return to any ports or places whatsoever until the cargo is landed in perfect safety; to wait for information off any ports or places without being deemed a deviation;” “on tobacco valued at £40 per hhd.” “at a premium of 15 guineas per cent, to return £7 per cent for arrival.” The policy contained the usual printed words, “beginning the adventure upon the said goods, from the loading thereof on board the said ship.” At the foot of it were added these words: “In continuation of five policies, one for £15,000 dated 16th March, 1810, No. 14; one for £4000 dated 20th March, 1810, No. 300; one for £2300, dated 11th April, 1810, No. 149; one for £500 dated 2nd October, 1809, No. 169; and one for £1200 dated 23rd February, 1810, No. 14.” It was proved that all the goods were in fact loaded at Virginia, from whence the ship sailed with her cargo on the voyage intended, which was described in the former policies (one of which was given in evidence) to be “at and from Virginia to her port or ports of discharge in the United Kingdom, or any port or ports, place or places, in the Baltic,” &c., with the like liberties as stated in the policy in question, *inter alia*, to “take in and discharge goods wheresoever the ship may touch at; at 20 guineas per cent, to return £5 for arrival; £12 per cent if voyage ended at Gottenburgh, or £15 per cent if in the United Kingdom.” The ship with her original cargo arrived at Gottenburgh, and afterwards proceeded with the same cargo to another port in the Baltic, and was captured. This defendant was not an underwriter upon any of the former policies. It was objected upon the * authority of *Spitta v. Woodman*, 2 Taunt. 416 (p. 569, [* 242] *ante*), that the insurance in question being “at and from Gottenburgh,” and “beginning the adventure on the said goods from the loading thereof on board,” must be confined to such goods

as were loaded on board at Gottenburgh, particularly as a liberty was reserved in the former policies to take in and discharge goods wherever the ship might touch at; but Lord ELLENBOROUGH, Ch. J., was of opinion that the words at the foot of this policy, stating it to be in continuation of former policies, showed that the parties contemplated the taking up the insurance on goods loaded before the ship arrived at Gottenburgh; and that the circumstance of this defendant not having been an underwriter upon the former policies, which was pressed upon his Lordship, would not vary the case. The jury found a verdict for the plaintiff.

The Solicitor-General moved for a new trial, renewing the above objections, and insisting upon the stipulation for the return of premium if the voyage ended at Gottenburgh, as showing that the parties contemplated that the voyage might be determined and a new voyage commenced at Gottenburgh.

[* 243] * Lord ELLENBOROUGH, Ch. J. — A very strict and certainly a construction not to be favoured, and still less to be extended, was adopted in the case of *Spitta v. Woodman*, where it was holden that the words, beginning the adventure from the loading on board were to be confined to the place from whence the risk commenced. But if there be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction. Then can there be anything more indicative of such an understanding between the parties, than the statement made at the foot of this policy, that it was in continuation of former policies, which were distinctly upon a voyage from Virginia. This was taking up the voyage from a period in the former policies. The conclusion, therefore, which was drawn in *Spitta v. Woodman* is completely rebutted by the reference in this policy to an antecedent loading.

LE BLANC, J. — The statement inserted at the foot of this policy seems intended to take it out of the strict construction adopted in *Spitta v. Woodman*.

PER CURIAM,

Rule refused.

ENGLISH NOTES.

The case of *Hodson v. Richardson* (1763), 1 W. Bl. 463, referred to in the argument of *Spitta v. Woodman*, was an action upon a policy of insurance [*semble* of goods] on ship at and from Genoa, the adventure to begin from the loading to equip for this voyage. It appeared that

the goods were put on board at Leghorn for a different voyage, and that the ship had put into Genoa in consequence of losing her convoy. It was held that the insured could not recover: by Lord MANSFIELD, Ch. J., and YATES, J., on the ground that there was concealment of a material fact; by WILMOT, J., that, whether material or not, the fact *that Genoa is the loading port* was not true; or, in other words, that the description “at and from,” &c., was in effect a warranty that Genoa was the loading port. *Hodgson v. Richardson* (1763), 1 W. Bl. 463.

The decision in *Spitta v. Woodman* was followed in two other cases where the insurance was on goods “at and from Gottenburgh,” where the ship had taken the cargo aboard in London before sailing. *Horneyer v. Lushington* (1811), 15 East, 46, 13 R. R. 759, No. 43, p. 637, *post*; *Langhorn v. Hardy* (1812), 4 Taunt. 628, 13 R. R. 708.

In *Nonnen v. Kettlewell* (1812), 16 East, 176, the policy was on ship and goods “at and from” Landserona to Wolgast, and the risk on goods was declared to be “at and from the loading thereof aboard the ship.” The goods had in fact been shipped at Gottenburgh some months before, but at Landserona a sufficient part of the cargo was taken out of the ship’s hold to enable the custom-house officer at Landserona “to inspect and examine the whole cargo on board.” This Lord ELLENBOROUGH held to be a virtual reloading of the whole, and sufficient to distinguish the case from *Spitta v. Woodman*; and as there was no concealment in the matter — the circumstances having been disclosed to the underwriters — the insured was held entitled to recover. This case was followed by the Court of Exchequer Chamber in *Carr v. Montefiore* (Ex. Ch. 1864), 5 B. & S. 408, 33 L. J. Q. B. 256, where there was an insurance of guano on board the ship *Don Hermanos* “at and from” port or ports in the River Plate, “beginning the adventure from the loading thereof the said ship as above.” The Court held that this description was answered by the fact — which was disclosed to the underwriters — that the guano had been partly unloaded (for the purpose of repairs), and reloaded at the port in the River Plate. EYRE, Ch. J., thought that in the Gottenburgh cases (*Spitta v. Woodman*, *Horneyer v. Lushington*, *Langhorn v. Hardy*, *supra*), a construction had been put on the policies so as to defeat the intention of the parties; and that the words “at and from,” &c., and “beginning the adventure,” &c., might have been read, not as a condition or warranty, but as a mere description to be understood with reference to the surrounding circumstances. At the same time he thought that, whether the words were to be read as importing an essential condition or were merely descriptive in the sense above mentioned, the principle of *Nonnen v. Kettlewell* was sufficient to validate the insurance.

 Nos. 32, 33. — *Spitta v. Woodman*; *Bell v. Hobson*. — Notes.

Where the policy was on goods "at and from P. to M.," . . . "beginning the adventure on the goods from the loading thereof on board the ship *wheresoever*," with liberty to touch and stay at any ports whatsoever and wheresoever, &c., the Court construed the claim as distinguishable from that in the cases of which *Spitta v. Woodman* is the type, and held that goods previously loaded at Liverpool was covered by the policy. *Gladstone v. Clay* (1813), 1 M. & S. 418, 14 R. R. 479. A similar construction was given to special clauses in policies in *Violet v. Allnutt* (1811), 3 Taunt. 419, 12 R. R. 676, 9 R. C. 375; and in *Hunter v. Leathley* (1830), 10 B. & C. 858, affirmed in Exchequer Chamber *s. n. Leathley v. Hunter* (1831), 7 Bing. 517, and see 9 R. C. 388. But where the policy was "at and from the coast of Africa to the ship's port of discharge in the United Kingdom, with liberty to touch at all ports and places whatsoever and wheresoever, to trade backwards and forwards . . . beginning the adventure on the goods from the loading thereof aboard the said ship 24 hours after her arrival on the coast of Africa," etc., it was held that the case was within the class of cases represented by *Spitta v. Woodman*, and not within *Gladstone v. Clay*, and that the policy did not protect an outward cargo shipped before the vessel's arrival on the coast of Africa. *Rickman v. Carstairs* (1833), 5 B. & Ad. 651. This followed similar decisions in *Robertson v. French* (1803), 4 East, 130, 7 R. R. 535.

In *Joyce v. Realm Marine Insurance Co.* (1872), L. R. 7 Q. B. 580, 41 L. J. Q. B. 356, 27 L. T. 144, there was a reinsurance of goods on ship at and from any port or ports in any order on the west coast of Africa to the vessel's port of discharge in the United Kingdom, the insurance to commence "from the loading of the goods as above." The reinsurance was declared to be "subject to all clauses and conditions of the original policy," one of which was "outward cargo to be considered homeward interest 24 hours after the vessel's arrival at her first port of discharge." The vessel was lost with some of her outward cargo more than twenty-four hours after her arrival at her first port of discharge. It was held that the policy had attached upon these goods within the principle of *Bell v. Hobson*.

Whether a policy on goods "at and from" a certain port to another port can attach to goods taken on board at an intermediate port is a question upon which some refined distinctions have been made upon the special terms of the policy. Where the policy was upon goods "at and from China to all or any ports or places whatsoever and wheresoever in the East Indies, Persia, or elsewhere beyond the Cape of Good Hope, in port and at sea, in all places, at all times, and in all services, until the ship's safe arrival in London, . . . beginning the adventure upon the said goods and merchandises from the loading thereof on board the

said ship at China," and it was stipulated that it should be lawful for the said ship in that voyage "to proceed and sail to, and touch, and stay at any ports or places whatsoever, for any purpose whatsoever, without being deemed a deviation:—it was held that the policy did not attach upon goods loaded at a port in India after discharging part of the homeward cargo from China. *Grant v. Paxton* (1803), 1 Taunt. 463, 10 R. R. 583. But in the case of *Grant v. Delacour*, referred to in the argument in that case, where there was a policy made in respect of the whole voyage, of which the homeward voyage from China in the case of *Grant v. Paxton* was part, upon a slight difference of language the insurance was held to attach upon cargo taken on board at any point on the voyage. The insurance there was on goods in the ship "at and from London to all parts and places on this side and on the other side of the Cape of Good Hope forwards and backwards, at sea, at all times, on all services, and in all ports and places, until the ship's safe arrival back again at her last station of discharge at Blackwall or Deptford, . . . beginning the adventure from the loading thereof on board the said ship at London, and so should continue until the said ship, with all her ordnance and goods and merchandise whatsoever, should be arrived as above, and back again at her last station of discharge at Blackwall or Deptford." The distinction was explained by MANSFIELD, Ch. J., chiefly on the ground that it could not be supposed that the goods loaded in London were to be carried back again; and the scope of the policy must therefore be taken to cover goods carried in the usual course of trading on such a voyage.

Where there is an insurance on goods "from A. to B." on a vessel bound for C., and not for B., it does not attach on goods shipped to C., although the voyages to B. and C. lie for some distance on the same course, and the ship is lost before arriving at the dividing point. And a clause in the margin, that "deviation or change of voyage ^{and} _{or} transshipment not included in the policy to be held covered at a premium to be arranged," has been held to make no difference, the case being not that there has been a deviation or change of voyage, but that the voyage insured has never been entered on. *Simon Israel & Co. v. Sedgwick* (C. A. 1892), 1893, 1 Q. B. 303, 62 L. J. Q. B. 163, 67 L. T. 785, 41 W. R. 163.

Where the policy is on "freight" at and from, &c., the inference is perhaps easier that it should not be confined to the freight on the goods actually loaded at that port. So where the policy was on freight "at and from port or ports of loading in Jamaica to her port or ports of discharge of the United Kingdom, with leave to call at all, any, or every one of the British and foreign West India Islands, to seek, join, and exchange convoy, beginning the adventure upon the goods from the

loading thereof aboard the said ship, as aforesaid," with liberty to proceed and sail to and touch and stay at any ports whatsoever "and wheresoever, with leave to discharge, exchange, and take on board goods at any ports or places she may call at, or proceed to, without being deemed any deviation from, and without prejudice to, this insurance," — it was held that the policy covered the freight for goods shipped at an intermediate port. *Barclay v. Stirling* (1816), 5 M. & S. 6, 17 R. R. 245.

But where the policy is on freight "at and from A. to X.," the policy does not attach if the ship is lost before arrival at A., although freight may have been engaged for the voyage from A., and although by a clause in the policy it is "to cover freight from the time of the engagement of the goods." These words might imply that, if freight was engaged, the policy would attach on the arrival at A., although the ship was lost before the goods were on board. But they are not sufficient to carry back the risk insured to a period before the arrival at A. *The Copernicus* (April 27 and C. A. June 24, 1896), 1896, P. 237, 65 L. J. P. D. & A. 61, 108, 74 L. T. 757.

An insurance was effected on freight of frozen meat valued at £3000 against (*inter alia*) breakdown of machinery "at and from Monte Video to any ports or places backwards or forwards in the River Plate," &c., . . . "the assurance aforesaid shall commence upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video." In this last clause the words "Monte Video" were written; the rest was printed. It was proved that frozen meat was never shipped on board at Monte Video, and this was known to both parties. The Court held that the printed words "from the loading of the said goods or merchandise on board of the said ship or vessel at Monte Video" were totally inapplicable to the subject-matter of the insurance (being, in effect, chartered freight), and the policy must be read as if the printed words were struck out so that the policy attached on the arrival of the ship at Monte Video. *Hydarnes Steamship Co. v. Indemnity Mutual Marine Insurance Co.* (C. A. 1895), 1895, 1 Q. B. 500, 64 L. J. Q. B. 353, 72 L. T. 103.

Freight for a voyage from London to Madeira, and thence to Jamaica, was to be paid in Madeira on delivery of the goods shipped at London for that place by a certain value in Madeira wine to be carried by the ship to Jamaica free of freight. When part of the cargo had been landed at Madeira, and before any of the wine was taken on board, the ship was blown out to sea by a storm and captured. It was held that an inchoate right to the "freight" so insured attached as soon as the ship broke ground at London, and further that "the freight," consist-

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ing of the wine to be shipped at Madeira and carried as part of the cargo (but freight free) to Jamaica, could not be apportioned; and, the stipulated payment having become impossible by a peril insured against, the insurer was entitled to recover as for a total loss. *Atty v. Lindo* (1805), 1 Bos. & P. (N. R.) 236, 8 R. R. 788.

AMERICAN NOTES.

Spitta v. Woodman is cited by Parsons, *Marine Insurance*, i. 77, 442; ii. 46, 50; and *Bell v. Hobson*, *ibid.* i. 77, 443; ii. 50.

It is well decided that where the policy expresses that insurance is to attach from the loading at a specified place, it does not cover goods loaded anywhere else. *Murray v. Columbian Ins. Co.*, 11 Johnson (N. Y.), 309 (counsel citing the *Spitta Case*); *Richards v. Marine Ins. Co.*, 3 Johnson (N. Y.), 307; *Scriba v. Ins. Co.*, 2 Washington (U. S. Circ. Ct.), 107.

In *Vreidenbergh v. Gracie*, 4 Johnson (N. Y.), 444, the insurance was on goods at and from any port in the West Indies, beginning the adventure from the loading there; but the insured informed the underwriters that goods had been shipped in New York for the West Indies, and requested insurance on these, and the policy was held to cover them; following *Nonnen v. Reid*, 16 East, 176.

In *Murray v. Columbia Ins. Co.*, *supra*, the insurance was from Cagliari to St. Petersburg, to attach from the loading on board, and the vessel sailed from New York with a cargo, and proceeded to Cagliari, where the whole cargo was hoisted on deck in order to take on salt as ballast, and then examined and restowed. It was held that the insurance covered only the salt. This seems somewhat opposed to *Nonnen v. Kittelwell*, 16 East, 176.

In 14 Am. & Eng. Enc. of Law, p. 348, it is said: "The English rule was disapproved and disregarded in *Creighton v. Union M. Ins. Co.*, 1 James (Nova Scotia), 195."

If the language is simply "at and from," the goods are covered, though previously loaded at another place. *Gardner v. Col. Ins. Co.*, 2 Cranch (U. S. Circ. Ct.), 473, counsel citing *Bell v. Hobson*; *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.), 73, distinguishing the cases "where the policy contained an express stipulation that the risk was to begin on the taking in of cargo at a specified port," and those "where the voyage was described as at and from a designated place, but the cargo was never at the place named, but was taken in at some other town or city," citing *Constable v. Noble*, 2 Taunton, 403; *Murray v. Columbian Ins. Co.*, *supra*. This doctrine, says Parsons (2 *Marine Insurance*, 51), "is very clear."

In *Clark v. Higgins*, 132 Massachusetts, 586, the policy was on goods "at and from Boston per railroad to Fall River, thence per Sound steamer to New York, and thence per Clyde's line to Wilmington, N. C.; beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof at — as aforesaid, and so shall continue and endure until the said goods and merchandise be safely landed at — as aforesaid." There was also a provision to cover such other risks as might be approved by H. and C., attorneys, and those attorneys certified an insurance

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from C. or G. to N. Y. It was held that this certified no warranty that the goods were to be loaded at C. or G. The Court said: "It has been held in several cases, which are relied on by the defendants, that a policy on goods at and from a particular port, beginning the adventure upon the said goods from the loading thereof on board the said ship at said port, is a warranty that the goods shall be loaded at that particular port, and that the policy will not attach upon goods previously loaded. *Robertson v. French*, 4 East, 130; *Horneyer v. Lushington*, 15 East, 46; *Graves v. Marine Ins. Co.*, 2 Caines, 339; *Richards v. Marine Ins. Co.*, 3 Johns. 307; *Murray v. Columbian Ins. Co.*, 11 Johns. 302. It has also been held that a policy on goods 'at and from Gottenburgh, . . . beginning the adventure upon the said goods from the loading thereof on board,' without specifying in terms that the loading is to be at Gottenburgh, is to receive the same construction, and will not attach upon goods loaded on board before the vessel arrived in Gottenburgh. *Spitta v. Woodman*, 2 Taunt. 416; *Langhorn v. Hardy*, 4 Taunt. 628; *Mellish v. Alnut*, 2 M. & S. 106; *Rickman v. Carstairs*, 5 B. & Ad. 651.

"On the other hand, it was held by Lord ELLENBOROUGH in *Gladstone v. Clay*, 1 M. & S. 418, that a policy on goods 'at and from Pernambuco to Maranham, beginning the adventure upon the said goods from the loading thereof on board upon the said ship, wheresoever, &c.,' attached upon goods loaded on board before the vessel reached Pernambuco. And in this Commonwealth it has been settled that a policy on goods at and from a certain port, without more, does not imply that the goods shall be loaded at that port. *Silloway v. Neptune Ins. Co.*, 12 Gray, 73."

"It remains to be considered whether the contract should receive the same construction in law, even without the filling of the blank, as if the words 'Charlottetown or Georgetown' were supplied. It has been seen that certain policies providing that the adventure should begin 'from the loading of the goods on board the said vessel,' without any words giving or calling for any further description of the place of loading, would be construed to mean from the loading at the port of departure, so that the legal signification would be the same as if those words were added. The Court in one case said that they felt themselves obliged to give this construction; obliged, that is by the necessary meaning of the language used, and in the connection in which the words occurred. *Spitta v. Woodman*, *ubi supra*. In *Robertson v. French*, also, which did not turn upon the precise phraseology now under consideration, great stress was laid by Lord ELLENBOROUGH upon the fact that the words were incorporated with the body of the text of the printed words, and made to form therewith 'one entire and continued chain of words, and one unbroken sentence of intelligible expressions all applicable to the same subject-matter.' In the present case the form is quite peculiar."

"In the present case the sentence of the clause relied on, being left incomplete, and calling for the addition of some further word or words, differs from that in *Spitta v. Woodman*, and other cases of that class. The collocation of the words is not such that by reason of the sequence, the words relating to the beginning of the adventure must be held to explain and limit the words 'at and from,' as in *Robertson v. French*, and other similar cases. Here the general printed clause contains the words which the defendants

No. 34. — Constable v. Noble, 2 Taunt. 403. — Rule.

would construe into a warranty, while the provisions specially adopted by the parties for this particular risk use the more general words 'at and from Charlottetown or Georgetown,' which imply no warranty that the vessel shall be loaded at either port."

"The plaintiff has strongly urged that *Robertson v. French* and other like cases should be overruled, as sanctioning an unjust rule of law. It is not necessary to determine that here. There is no doubt, according to the decided cases, that the construction of words which of themselves would require the loading to be at the port of departure for the voyage insured, may be controlled by a special memorandum, or by circumstances showing that such construction was not intended in the particular case. *Bell v. Hobson*, 16 East, 240; *Carr v. Montefiore*, 5 B. & S. 408, 422; 33 L. J. (N. S.) Q. B. 256, 259, 260; *Nonnen v. Reid*, 16 East, 176. The view above taken is quite consistent with all the authorities, and renders it unnecessary to consider the other questions presented by the bill of exceptions."

No. 34. — CONSTABLE v. NOBLE.

(1810.)

No. 35. — MOXON v. ATKINS.

(1812.)

RULE.

A POLICY on goods at and from a place named does not attach upon goods which are loaded at another place within the limits of a port having the same name, unless there is a particular usage in mercantile contracts to use the name of the former place to cover a district comprising the latter place.

But if there is such a usage, effect will be given to it so that the policy may attach upon the goods so loaded.

Constable v. Noble.

2 Taunt. 403-407 (11 R. R. 617).

Insurance. — "At and from." — Town or Port.

A policy at and from a place, the name of which equally designates a [403] particular town, and a port comprehending an extensive district of coast, does not protect a cargo laden anywhere within the limits of the port, but refers to the town itself.

A policy "at and from Lyme to London" does not protect a cargo laden at Bridport within the port of Lyme, and eight miles nearer to London.

This was an action upon a policy upon flour, at and from Lyme to London, by the *Swift*, and ship or ships. Upon the trial of this cause at the Guildhall Sittings after last Hilary Term, before MANSFIELD, Ch. J., it appeared that the first part of the flour insured was put on board the *Swift* at Lyme, which sailed from thence and arrived; another parcel was shipped at Bridport Harbour, on board the *Rose*, which, in coming round to London, was captured by a French privateer. It was proved that there is no custom-house at Bridport Harbour, which is a member of the port of Lyme; that all ships which sail from thence are obliged to proceed to Lyme in order to procure their clearances there, from the customer of that port, and that Bridport Harbour lies about nine miles to the eastward of Lyme, and consequently geographically nearer to London, and a vessel bound from Lyme to London must therefore pass Bridport in her course; but whether on account of the necessity of standing out at first from Bridport on a more southerly course, in order to get clear of the Bill and island of Portland, before the easterly course could be pursued, it was a more or less easy navigation from Bridport to London than from Lyme to London, did not appear by the evidence. Axmouth, which lies about ten miles to the westward of Lyme, is also a member of the same port. The defendants contended that the *Rose* did not sail from Lyme, and that therefore this voyage was wholly a different adventure from the voyage insured, and the risk never attached, for that the description in the policy referred to the local point from which the vessel was to sail, not to any political divisions of the kingdom. On the other hand, the plaintiff urged that a sailing from [* 404] any part of the port of Lyme was sufficient to satisfy this policy, and as Bridport was nearer to London than Lyme was, the circumstances were so much the more favourable to the defendants, who therefore could not complain. MANSFIELD, Ch. J., reserved the point, subject whereto the jury found a verdict for the plaintiff.

Lens, Serjt., in this term obtained a rule *nisi* to set aside the verdict and enter a nonsuit.

Shepherd, Best, and Vaughan, Serjts., now showed cause. — If a ship receives her cargo at Deptford, that is not locally and strictly

at London, but she would receive her clearances from the custom-house of London, and the risk would be protected by a policy at and from London. In this case an insurance at and from Bridport, and an insurance at and from Lyme, would equally have protected this risk, though perhaps an insurance at and from Bridport might not have protected a risk at and from Lyme, because the town of Lyme is more distant, and therefore the risk would be increased; but it is sufficient in a policy generally to designate the port from which a vessel sails; more minute accuracy is not required: it is not necessary to designate some particular point or district in the port itself. If it were, half the policies effected would be void. It would be said that a ship which loads at the sufferance quays in Surrey does not load in London. Nor would cargoes taken in at Limehouse and Gravesend, which are in Middlesex, be protected by a policy at and from London. The words must be construed according to the subject-matter. It has lately been decided in the Court of King's Bench, that neither the London Docks nor the East India Docks are within the city or liberties of London; yet who will say that ships there laden are not protected by a policy at and from *London? The case of *Payne v. Hutchinson*, C. P. Guildhall Sittings after Trinity Term, 1808 (2 Taunt. 405 *n.*, and *post*, p. 591), is distinguishable from this, for there the vessel was lost in a river, where *she never could have gone at all if she had sailed from [*406] Caermarthen instead of Kidwelly: here it is in proof that a ship coming out of Lyme must pass by Bridport Harbour. In the case of *Higgins v. Aguilar* (not reported), on a policy at and from Demerara to London, it was held that a loading at Essequibo was a loading at Demerara.

MANSFIELD, Ch. J. — That case was decided upon the particular usage of the trade: and if the plaintiff in this case could have proved an usage for ships to load at Bridport, upon a policy at and from Lyme, it might have assisted him; but no such usage was proved here. Probably the underwriters never underwrote a voyage from Bridport in these terms before. The whole is obviously a mistake, and proceeded from the circumstance that the parties knew that the *Swift*, the first vessel which was covered by this policy, was to sail from Lyme; they therefore concluded that the ship and ships would sail from the same place. It was in evidence that Guernsey is within the port of Southampton, and

[* 407] Liverpool within the * port of Chester, and that the port of Exeter extends near thirty miles to the eastward of that city. *Rule absolute.*

Moxon v. Atkins.

3 Camp. 200–202 (13 R. R. 789).

Insurance. — “*At and from.*” — *Usage to include Limits of Port.*

[200] Policy on goods “at and from the ship’s loading port or ports in Amelia Island to London.” The ship never touched at Amelia Island, but took in her cargo at Tigre Island, which lies a little farther up the river St. Mary’s. *Held*, that the policy nevertheless attached, this being the usual mode in which ships in that trade take in their cargoes.

This was an action on a policy of insurance on goods on board the *Sheddens*, “at and from the ship’s loading port or ports in Amelia Island to London.”

Amelia Island lies near the mouth of the river St. Mary’s, which divides Spanish America from the territories of the United States. There is no port of any sort in the Island. A little farther up the river is Tigre Island, which is quite uninhabited. Here ships generally lie to take on board the produce of the interior country brought down the river, although in some instances they make fast to Amelia Island by an anchor put on shore, and load there. Having taken in their cargoes at Tigre Island, they drop down to Amelia Island, abreast of the town of Amelia, the residence of the Spanish governor, where they pay duties and obtain their clearances.

[* 201] *The *Sheddens* on the voyage in question, without touching at Amelia Island, took in her cargo at Tigre Island. This consisted of lumber brought down the river. She then set sail, paid the duties, and obtained her clearance at Amelia Island in the manner above described, and was lost by the perils of the sea on the voyage home.

The Attorney-General, for the defendant, contended that under these circumstances the policy had never attached. The ship had never been at any loading port or ports in Amelia Island, and had taken in no goods there. Amelia Island and Tigre Island were as distinct as Great Britain and Ireland. What the secret understanding of the parties might be was immaterial. The contract between them must be gathered from the language of the policy,

and that made the risk to commence upon a contingency which had never happened.

LORD ELLENBOROUGH. — The words of the policy cannot be literally understood, for there is no port in Amelia Island where the ship could load. The real question is, whether there has been a loading at Amelia Island within the meaning of the parties when the policy was effected. Strictly and locally, there has been no loading at Amelia Island. But it is possible that in mercantile contracts Amelia Island may denominate a region in which Tigre Island is comprehended. Essequibo has been held for some purposes to be part of Demerara, although the two settlements are quite distinct. There is the more familiar instance *of Westminster being considered in London, the gen- [* 202] eral name for the metropolis; yet we know that in strictness London only comprehends the limits of the city. The circumstance of the ship paying duties and clearing at Amelia Island may go a great way to show that ships which do so are conceived to have loaded there. The question here will be, whether upon the evidence this cargo can be said to have been loaded at Amelia Island according to the usage of such voyages. If it was, the policy attached, although literally speaking no part of the cargo had ever been upon Amelia Island.

The plaintiff had a verdict.

ENGLISH NOTES.

The case of *Payne v. Hutchinson*, referred to in the argument of *Constable v. Noble* (p. 589, *supra*), was as follows (2 Taunt. 405, n., 11 R. R. 620): —

The action was brought upon a policy of insurance effected at a premium of four guineas per cent upon goods on board the ship *Catherine*, “at and from Caermarthen to London,” to recover a partial loss by damage by sea-water. The declaration averred that the ship was in good safety at Caermarthen, and that divers goods of great value were there, to wit, at Caermarthen, loaded on board the said ship, to be carried from thence upon the voyage insured, and that the plaintiffs were then and there interested in the said goods to the whole amount of the insurance. Upon the trial of the cause at the sittings after Trinity Term, 1808, at Guildhall, before MANSFIELD, Ch. J., it appeared that, several actions on the same policy having been commenced, a consolidation rule had been obtained, upon the terms of the defendant’s admitting his subscription and the interest as averred in the declara-

 Nos. 34, 35. -- *Constable v. Noble; Moxon v. Atkins.* — Notes.

tion. The evidence was that the vessel took in a cargo of tin plates at Llanelly, and sailed thence for London. Llanelly is a member of the port of Caermarthen; but there is a distinct custom-house at Llanelly, as well as a custom-house at Caermarthen, and when ships clear out from Llanelly a custom-house officer is sent over thither to give them their clearances; but Caermarthen lying high up the river, and accessible only by an intricate navigation, few ships engaged in the coasting trade clear out from that place, except coasters belonging to Caermarthen itself; the docket produced in evidence was furnished by the custom-house at Llanelly. It was objected for the defendant that the plaintiff had not proved his interest in the goods, and that this was a fatal variance; for that the voyage and goods described in the policy was a voyage from Caermarthen, and goods laden there; and there was no evidence that such a voyage had ever been commenced; if the policy was meant to apply to the voyage from Llanelly, the voyage was not correctly described in the policy, and either there was no proof of the plaintiff's interest, or the risk never attached. The jury, however, found a verdict for the plaintiff for £45 9s. 8d.

Vaughan, Serjt., in Michaelmas Term, 1808, obtained a rule *nisi* to reduce the damages to £4 4s., the amount of the premium, upon the ground that the risk had never attached.

Shepherd, Serjt., for the plaintiffs, on a subsequent day in the same term, argued that the defendant was estopped by his admission from setting up any such defence. He had admitted the interest as averred in the declaration. The interest averred in the declaration was an interest of the plaintiffs in the said goods; the said goods were the goods before averred to be loaded at Caermarthen; so that in effect, in admitting the interest, he had admitted that the goods insured were loaded at Caermarthen, and he was now precluded from proving or contending the contrary.

Vaughan was prepared to support his rule.

The Court observed that there were separate custom-houses at Caermarthen and Llanelly, and that a custom-house officer was sent over to the latter place, when coasters clear out from thence; the admission of interest had not precluded the objection, which must therefore prevail. Rule absolute.

AMERICAN NOTES.

Both these cases are cited in 2 Parsons on Marine Insurance, p. 48. *Constable v. Noble* is distinguished in *Silloway v. Neptune Ins. Co.*, 12 Gray (Mass.), 73. *Moxon v. Noble* is cited in Lawson on Usages and Customs, sect. 111.

Parsons says (see *supra*): "If the words are 'at and from' a certain port,

although the insurance begins only at that port, the word may comprehend an open roadstead, or any place included naturally or usually within the port named, as places at which vessels receiving cargoes are considered as 'at' the port. It is sometimes a difficult question of mixed law and fact whether a certain place is really within the scope of the word 'port,' or is a part of a place named; and this question can only be answered by usage and the nature of the case."

Thus, in *McCargo v. Merchants' Ins. Co.*, 10 Robinson (Louisiana), 334, Hampton Roads was held to be within a policy phrased "at and from Norfolk," the former being "rather an extension of the harbor of Norfolk." So also as to Angostura, in Yucatan, there being no regular ports or harbors in that country, but Angostura being "one of the usual and customary places for delivering and receiving cargoes on the coast of Yucatan." So in *Petrie v. Phoenix Ins. Co.*, 132 New York, 137, parol evidence was approved to show that by the custom of insurers the term "harbor of New York" included Tarrytown (some forty miles up the Hudson River), and other points in the New York custom-house district.

The port of New Orleans in mercantile understanding embraces the wharves on Lake Pontchartrain. *Mobile M. D. & M. Ins. Co. v. McMillan*, 27 Alabama, 85, citing both the principal cases.

A policy on goods to be safely landed at Leghorn is discharged by landing them at the Lazaretto, according to the usage. *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S. Sup. Ct.), 75. MARSHALL, Ch. J., said: "The termination of the voyage as to the ship does not necessarily terminate the risk on the goods. This risk may continue when the voyage as to the ship is ended. Its duration depends on the intention of the parties, and this intention must be found in their contract." "When the parties stipulated that the adventure should continue till the goods were landed in safety at Leghorn, they knew that the place of landing was the Lazaretto, and that the landing would be made under the direction and control of the local authority. It is the landing which terminates the risk."

The same principles are established in *Bramhall v. Sun M. Ins. Co.*, 104 Massachusetts, 510; 6 Am. Rep. 261, citing *Whitwell v. Harrison*, 2 Exch. 127, and *Harrower v. Hutchinson*, L. R. 4 Q. B. 523; 5 *ibid.* 584.

In *De Longuemere v. N. Y. F. Ins. Co.*, 10 Johnson (N. Y.), 121, KENT, Ch. J., observed: "The parties to the policy are to be presumed to have been acquainted at the time of the subscription with the nature and situation of the places to which the contract relates. The underwriter need not surely have been told the state of the coast of the province of Yucatan, nor the topography of Sisal. These are general topics of knowledge of which every underwriter takes upon himself to be informed. The word 'port' in the policy must be taken in reference to the subject-matter to which it is applied. It may generally mean a harbor or shelter for vessels from storms,

" 'Insula portum
Efficit objectu laterum, quibus omnis ab alto
Frangitur, inque sinus scindit sese unda reductos.'

No. 36. — *Hill v. Patten.* — Rule.

But when the term is applied to Sisal, or any other trading place on the coast of Yucatan, it cannot mean such a harbor, for it is well known, and was proved in this case, that there are none such on that coast. Humboldt says that there is not, properly speaking, a port on the whole eastern coast of New Spain. The word was used here to designate landing places, at Sisal and elsewhere, within the prescribed limits, where ships usually delivered and received their cargoes. It is frequently defined in the books in this commercial sense, without any particular reference to its fitness for naval security. Molloy (b. 2, ch. 14, sect. 8) defines a port to be a public place to which the officers of the customs are appropriated."

A vessel is "at Sydney" so that the policy will attach when she calls there for orders, but comes only into waters known on the charts and to practical men as "Sydney Harbor," five miles distant from the harbor of North Sydney, and ten miles distant from that of Sydney. *Troop v. St. Paul, &c. Ins. Co.*, 33 New Brunswick, 105; affirmed 26 Canada Supr. Ct. 5.

No. 36. — *HILL v. PATTEN.*

(K. B. 1807.)

No. 37. — *TOBIN v. HARFORD.*

(EX. CH. 1864.)

RULE.

"Goods," as the subject of insurance, are distinct from "outfit," which is comprised in an insurance on ship.

Shifting or successive cargoes on board the same ship in the course of a trading voyage may be the subject of insurance under the word "goods;" and in case of goods so insured the policy attaches only on the goods from time to time on board.

Where such a cargo is insured under a valued policy, and the goods on board are totally lost, the sum recovered will be only such proportion of the value, as the amount of goods on board bears to a substantial cargo.

Hill v. Patten.

8 East, 373-378 (9 R. R. 469).

Insurance. — Goods. — Outfit.

A policy effected on "ship and outfit," on a voyage upon the southern [373] whale fishery out and home, cannot be altered by consent, after the ship sails and the risk attaches, to an insurance on "ship and goods," without a new stamp,—outfit, the subject-matter, of insurance, being essentially different in such a voyage from goods, and therefore not within the exception of the Stat. 35 Geo. III., c. 63, s. 13, which enables alterations to be made in the terms or conditions of a policy, without having a new stamp, so that the thing insured remains the property of the same persons, &c.

It seems, however, that shifting or successive cargoes on board the same ship in the course of the same adventure (as in the African and other trades) out and home may be covered by an insurance on goods.

This was an action upon a policy of insurance on ship and outfit, in a voyage upon the southern whale fishery out and home, which was effected in September, 1804; and on the 13th of March, 1805, long after the sailing of the ship on the voyage insured, but before any advice received of her, in consequence of some misunderstanding between the broker and his principal as to the broker's instructions at the time of effecting the policy, an application was made to the underwriters, who agreed to alter it, which was done by a memorandum indorsed on the policy in these words:

"It is hereby agreed that the *interest on this policy [* 374] shall be on ship and goods instead of ship and outfit as originally declared." The ship was afterwards lost in the course of the voyage. It was objected at the trial before Lord ELLENBOROUGH at Guildhall, that however the policy might have been effected in the original terms of it, through a misunderstanding between the principal and his agent, yet the contract was equally binding between the contracting parties at the time; and as the risk had once attached, it was not competent to the parties to make the alteration, though by consent, without a new stamp; goods being a distinct subject-matter of insurance from outfit in such a voyage; and therefore not within the exceptions of the Stat. 35 Geo. III., c. 63, s. 13, which enables the parties to make any alteration in the terms or conditions of a policy, so that the thing insured (which must be taken to mean the same subject-matter of insurance) shall remain the property of the same person. The

plaintiff, however, recovered a verdict, which was moved to be set aside in Michaelmas Term last; and a rule *nisi* was granted, against which Dallas, Marryat, and Lawes showed cause, and Garrow and Sir V. Gibbs supported the rule. The case was directed to stand over till the judgment of the Court was given in *Kensington v. Inglis*, 8 East, 273 (9 R. R. 438), in which the same clause of the Stamp Act was under consideration. And now

Lord ELLENBOROUGH, Ch. J., delivered the opinion of the Court.

The question in this case was, whether the alteration of this policy, from a policy upon ship and outfit to one on ship and goods, required an additional stamp, within the meaning [* 375] of the Stat. 35 Geo. III., c. 63, s. 13. The * policy was “at and from London to the South Seas, during the ship’s stay and fishing there, and at and from thence to Great Britain, &c.” The alteration was made from ship and outfit to ship and goods, by consent of the underwriters, after the ship had sailed on the voyage insured, and of course after the policy had fully attached upon what was, at the time of such sailing, the thing or subject insured, viz. ship and outfit. Outfit, particularly for such a voyage as is described in the policy, differs materially from what is comprehended under the term “goods.” Outfit, in a fishing voyage, principally consists in the apparatus and instruments necessary for the taking of fish, seals, &c., and the disposing of them when taken, in such a manner as to bring home the oil, blubber, bone, skins, and other animal produce of the adventure, with the greatest convenience and advantage. As far as the outfit consists of provisions put on board for the use of the crew, it is (according to the case of *Brough v. Whitmore*, 4 T. R. 206 [2 R. R. 361]) covered by an insurance on ship, being in effect part of the necessary furniture, stores, and equipment of every ship proceeding on a voyage. But outfit, though it may in this qualified sense be considered as part of the ship or ship’s furniture, yet it cannot be considered as goods in any proper sense of that word; *i. e.*, as part of the wares or cargo for sale, laden on board the ship; still less as part of the homeward-bound cargo in this voyage out and home; recollecting that in a fishing voyage the only cargo on board the ship from first to last is, in general, the homeward-bound cargo, consisting of the immediate produce and result of the fishing adventure. The outfit, originally insured, being therefore thus essentially different from goods afterwards made the subject of insurance under this policy,

the question is whether such * a change in the subject- [* 376] matter of the insurance may be made in a policy once effected, without an additional stamp, in virtue of the provisions of the Stat. 35 Geo. III., c. 63. The 13th section of the statute on which the question arises provides "that nothing contained in the Act shall prohibit the making of any alteration, which may lawfully be made in the terms or conditions of any policy of insurance duly stamped as aforesaid, after the same shall have been underwritten, or to require an additional stamp duty by reason of such alteration : so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. per cent on the sum insured ; and so that the thing insured shall remain the property of the same person or persons ; and so that such alteration shall not prolong the term insured beyond the period allowed by this Act ; and so that no additional or further sum shall be insured by reason or means of such alteration." And the question is, whether that part of the provision which requires that " the thing insured shall remain the property of the same person or persons " has been in this case well complied with or not. The words, " the thing insured shall remain the property," &c., appear to us properly to require and apply to one identical and continued subject-matter of insurance ; such subject-matter all along remaining the property of the same proprietor ; and to be ill suited to a case like the present, where the thing last insured is not only in fact, but in name and kind (as a specific subject of insurance), essentially different from the thing first insured ; and which begins also to have an existence at a different and much later period than the other ; and * when the thing first insured [* 377] hardly, or in a small degree, remains or continues to exist at all. To make the words of the provision tally with such a case, instead of " the thing insured," it should be read in the plural number, " the things insured ; " and instead of " shall remain," it should be read " shall be the property," &c. Without some such change in its phrase the Act cannot well be accommodated to the case of several things different in name and kind, as subjects of insurance, successively existing and successively covered by one and the same policy of insurance ; which is the case now before us. It is not, however, to be inferred from hence that shifting of successive cargoes on board the same ship, in the course

No. 37. — *Tobin v. Harford*, 34 L. J. C. P. 37.

of the same continued adventure, as in the African and other trades out and home, may not properly be the subject of insurance under the word "goods;" for in some of those cases the successive cargoes, *i. e.*, of English goods, African articles of traffic, and lastly West India produce, are, according to the course of such trading adventures, one continued subject-matter of insurance, under the one name of "goods." The adventure is the same in its general denomination from first to last; though the parts of which it consists are not coexisting, but successive, and in kind and quality wholly dissimilar from each other. With all the unwillingness which we cannot but feel to give way to an objection, which the underwriters bring forward in despite of their own consent on this subject once given, we are nevertheless obliged to give effect to it, by pronouncing that the terms of the Act have not been complied with; and that the policy, in its last and altered state, is to be considered, on account of such alteration, as an unstamped policy; and the contract which it purports to contain, as being on [* 378] that account void; * and the plaintiff, therefore, not entitled to retain the verdict he has obtained thereupon. There must therefore be a new trial. *Rule absolute.*

Tobin v. Harford.

34 L. J. C. P. 37-41 (s. c. 13 C. B. (N. S.) 791).

[37] *Marine Insurance. — Time Policy. — Valued Policy. — Total and Partial Loss.*

A policy of insurance for twelve months on ship and cargo, the ship being intended for the barter trade on the coast of Africa, contained a stipulation that "outward cargo should be considered homeward interest twenty-four hours after arrival at the first port or place of trade." By a subsequent clause the policy was declared to be "on the ship valued at £2000, cargo valued at £8000." There was liberty given to the insured "to discharge, load, unload, reload, sell, barter, exchange, and trade" any part of the cargo. The ship arrived at a place on the coast of Africa and there discharged a large part of her cargo, and after a stay of more than twenty-four hours proceeded towards other ports in order to take in other cargo; before arriving at her next port of destination she was totally lost. *Held*, that the insurers were not liable to pay the whole £8000, but a proportion only; that the valuation in the policy was applicable to what was substantially a full cargo, whereas here there was not substantially a full cargo.

Held, also, that the proportion of the £8000 which the underwriters were liable to pay was to be ascertained by finding the proportion which the goods on board at the time of the loss bore to a full cargo, and if this proportion could

not be found, that then the underwriters would be liable as upon an open policy underwritten for £8000.

This was an appeal by the plaintiff against the decision of the Court of Common Pleas, making absolute a rule to enter a verdict for the defendant pursuant to leave reserved. The facts and arguments are set forth in the report below (32 L. J. C. P. 134).

The following is a short summary of the case: The action was on a policy of insurance on a vessel called the *Shark*, for twelve months, commencing from the date of the vessel's leaving the port of Liverpool, on any kind of goods and merchandises, and also on the body of the ship. It was provided in the policy that it should be lawful for the ship to proceed to touch and stay at any ports or places, with leave to discharge, load, unload, reload, sell, barter, exchange, and trade all or either goods or property upon the coast of Africa and African islands, &c., without prejudice to the insurance. The outward cargo was to be considered homeward interest, twenty-four hours after arrival at the first port or place of trade. The policy was declared to be on the ship for £2000 and on the cargo for £8000. The defendant had underwritten the policy for £100.

The ship sailed in due course and arrived at Kinsembo, on the coast of Africa. She had then on board a cargo, the prime cost of which was £6226 5s. 6d., and she landed there a portion, the invoice cost of which was £3952 8s. 3d. A few days afterwards, without taking in any fresh cargo, she sailed away, and while on her way to Congo, for the purpose of taking in fresh cargo, and during the time insured against, she was totally lost by perils of the sea. The defendant paid into court £20 in respect of the loss of the ship, and *£43 in respect of the loss of [*38] the cargo. The plaintiff contended that the underwriters were liable as for a total loss of the cargo, and that they were bound to pay the whole £8000, and consequently that the defendant was bound to pay the whole of the £100 without any reference to the proportion which the cargo lost bore to the cargo with which the ship had started on her voyage.

A verdict was entered for the plaintiff for £37, the difference between the amount paid in and the amount claimed, leave being reserved to the defendant to move to enter a verdict for himself.

Bovill (J. Brown with him) (June 17), for the plaintiff, the

appellant, contended that the plaintiff was entitled to recover the whole sum of £8000 in respect of the loss of the cargo; that the policy was framed to meet the case of a shifting cargo, and that it was the intention of the parties that that sum should be deemed and taken to be the value of the goods on board at the time the ship went down.

Mellish (Lush and Sir G. Honyman with him), for the defendant, the respondent, urged that, although the plaintiff would have been entitled to receive the £8000 if there had been a whole cargo on board, yet as the goods on board at the time of the loss were only a portion of a cargo, the plaintiff was entitled to recover only such a proportion of the £8000 as the portion of cargo on board at the time of the loss bore to a complete cargo.

The Court (consisting of POLLOCK, C. B., CROMPTON, J., BRAMWELL, B., CHANNELL, B., BLACKBURN, J., and SHEE, J.) took time to consider their judgment.

The following judgments were delivered on the 18th of June:—

POLLOCK, C. B. — I believe, with the exception of my Brother BRAMWELL, who entertains some doubt upon the matter, but does not differ from our judgment, that we are all of opinion that the judgment of the Court below ought to be affirmed, for the reasons stated in the judgment of that Court. I will merely add, for my own part (the rest of the Court not being responsible for what I say), that the question as stated by Mr. Mellish seems to be, what is the meaning of the word “cargo”?—whether “cargo” means the goods that may accidentally be on board the vessel at a particular moment, or whether it is used with reference to the anticipation of that which the vessel is really afterwards to carry. Applying to the word the ordinary rules of construction, I think there cannot be a question that it must mean, not the accidental goods that may happen to be on board, which no doubt may be called the vessel’s “cargo” in one sense, but that it must have reference to something more, to be derived from the known employment of the vessel. The “cargo,” in my opinion, means the entire quantity of goods which are expected to be put on board.

CROMPTON, J. — I am of the same opinion, for the reasons stated by my Brother WILLIAMS in the Court below, and now given by the LORD CHIEF BARON.

BRAMWELL, B. — I am sorry to say that in my mind there is

considerable doubt, to which I would desire to give expression. I have not the courage to differ from the opinion of the learned Judges in the Court below, and of my Lord and my learned Brothers now present, but I think that my own unassisted judgment would not have come to the same conclusion at which they have arrived. This is a policy on the ship and goods, and a valued policy on goods; and it is upon a voyage where the ship is to sail with more or less cargo in her, and come back with more or less cargo in her. The character of the trade is such that it is impossible for the assured to say at any time what is the quantity of cargo on board, and what its nature and value, — probably he can tell when she goes out what she carries, — or, when she is finally on her voyage home, what she has got; but as to the intermediate ports he cannot tell beforehand, or by advice, what is to be given to him. In order to guard against that, he says, I will effect a policy for £8000, whereby it is to be assumed that the ship has always on board £8000 worth of goods. It is said that it is a reproach to this policy that it is wagering: no doubt it is; but the justification of it is, that it is the least gaming speculation that the assured can enter into. If he had had no policy at all, his voyage would have been of a more wagering and speculative character, and in no other possible way, according to his account, can he insure himself. Therefore, although this is wagering, it has the merit of being the least wagering transaction that can be entered *into in relation to the matter [*39] in hand. Now, documents ought to be construed not so much in relation to extreme improbabilities, but rather with reference to what is likely to happen. It was probable that the vessel would always have on board a substantial cargo; that at one place she might put out goods to a considerable amount, and at another place she might take in probably what was worthless. We have not delegated to us the power to make this instrument, but merely to construe the agreement for the parties. Then, what construction ought it to receive? It is a policy on ship and goods, and manifestly, but for the statement of value, it would be a policy upon whatever goods are on board at the time; because the shipper is at liberty to put some goods out and take some in, and put those out again, and again take others in. The ship is valued at £2000, and the cargo valued at £8000. Making every allowance, as I do, for the unmethodical way in which the policy

is drawn, it seems strange that the introduction of the word "cargo" (by which I believe the parties meant no more than goods) should make the policy mean that it is not to be a valued policy upon the goods, but that it is to be a valued policy on a sort of entity, or thing, which is called a cargo, and that it is afterwards to be found out what proportion the actual goods on board bore to this cargo. Then, avowedly, there is not only considerable difficulty in applying that rule, but it really is an impossibility, because the word "cargo," as certainly was conceded by Mr. Mellish yesterday, does not mean a full cargo. If the vessel had taken a partial or not a full cargo out with her, and was totally lost, — so if she was lost on her final voyage home with not a full cargo, it is conceded, as I understand, that the whole £8000 would have been recoverable. Therefore the word "cargo" here does not mean a full cargo. Then, what other meaning is to be given to it? It is said that it is an intended cargo, or a destined cargo, the cargo which it was right she should have at the time, and not an incomplete cargo. Why so? It possibly may be, that if the ship got to a port and a quantity of cargo was there for her, and after she had got some on board, was blown out to sea and lost before she had got the residue on board, it might possibly be said that there was not the intended cargo on board, and that the intended cargo in that sense was not lost. Supposing that is so, why in this particular case had the vessel not got on board her cargo? She had got on board everything that it was intended she should have there; she was not in a state of incompleteness in any sense. She had gone out with a great quantity of goods, and had landed some of them at this place, Kinsembo, and then she was lost with the residue. Suppose that she had started with the residue only on board, and landed none at Kinsembo, if I understand Mr. Mellish's concession right, the plaintiff would have been entitled to recover the whole £8000, for she would then have had on board her destined and intended cargo, and having put none of it out, there would have been a loss of the cargo within the meaning of the policy. It seems strange that because she takes out something more, and that additional portion is landed at this place, the plaintiff cannot recover the £8000. Suppose the vessel had taken something on board at Kinsembo; suppose she had filled up with a variety of goods of small value, — it is, I believe, admitted that she would

have had her destined cargo on board. It seems to me singular that taking in those few comparatively worthless goods at Kinsembo should make her have her cargo on board. All these circumstances would have made me think (of course I cannot think so now, after the unanimous judgment of the Court of Common Pleas and of my learned Brethren here) that this word "cargo" was simply identical with "the goods;" and consequently that the true construction of the policy would have been in conformity with what has been contended on behalf of the plaintiff.

Then, with respect to the authorities. The reasoning of the Court in *Shaw v. Felton*, 2 East, 109 (p. 631, *post*), is, I think, in favour of the plaintiff. In *Forbes v. Aspinall*, 13 East, 323 (p. 673, *post*), the Court expressly say, that because the intended cargo was not on board, the whole of the freight was not the subject of the loss, and that they must take such a proportion as the cargo put on board bore to the intended cargo. *I [*40] think that that case is in the plaintiff's favour, because here the whole of the intended cargo was on board. A similar remark applies to the case of *Rickman v. Carstairs*, 5 B. & Ad. 651. I think, therefore, if I had been left to myself upon the authorities I should have decided this case in favour of the plaintiff. I am at a loss to understand the meaning of the Court of Common Pleas, confessedly acknowledging that the fact of this being a valued policy must be left out of consideration in apportioning the loss. However, I must, of course, concur with the judgment of the Court.

BLACKBURN, J. — Agreeing as I do with the majority of this Court, that the Court of Common Pleas were right in their decision, and right also in what I understand to be their reasons, I would wish to say with regard to the real point to be decided, that in my mind the fact that this is a valued policy is a mere accident, and has nothing to do with the question. The question of whether there was a total or a partial loss is independent in this case, as in my mind it ought to be in every case, of whether the policy was valued or not valued. The question in all cases is, what is the subject-matter that is covered by the insurance? Let us see whether the whole of the subject-matter is lost, in which case it would be a total loss, or whether only a part is lost, in which case it would be a partial loss, the amount of

which would depend on the proportion which the part that was lost bore to the subject-matter of the insurance. Then, if that is a valued policy, the value being admitted, the sum when reduced to figures is proved. If it be an open policy, you must prove the value of the whole of the subject-matter. It would come to the same result after it is proved, and it being a valued policy only dispenses with the proof. However, in my mind the question comes to be, what is the subject-matter of insurance in the policy? The policy itself is made up, as every policy ought to be, of a printed form originally intended for an ordinary voyage policy altered to meet this peculiar African trade, and further altered into a time policy for twelve months. Thus much appears clear enough, that this is a policy partly on the ship (with which we are not now concerned) and partly on the cargo. To my mind it is immaterial whether it said on cargo or on goods, — goods, I think, would mean cargo, cargo would mean goods. It means, in my opinion, the goods which, on such a voyage, would be all that are to be carried by the vessel as her cargo, and if it had been the word “goods,” the same would have been meant. The facts appear to be this: that this ship sailed on this time policy from Liverpool, and that it attached on the cargo which she had on board. The nature of the adventure on which she was bound to the coast of Africa was that the cargo taken on board at Liverpool was intended to be substituted and exchanged by barter for cargo the produce of the coast of Africa. There are words in the body of the policy intended to meet that state of things, and which, no doubt, were framed in those terms when originally the natives were in the habit of carrying on the barter from their canoes alongside the ship, and as the master parted with the European goods which the natives wanted to receive, he obtained from the natives the produce of their country in exchange. The effect of the words in the policy is, that it is to continue to attach to what is substituted for the goods originally put on board: that this policy on the cargo that went out is to be also on the cargo that comes in the place of it afterwards. In this case it appears that the cargo that went out from Liverpool to Africa arrived on the coast of Africa, and that 57 per cent was safely landed, and the ship was lost with the other 43 per cent on board. Nothing being substituted for the 57 per cent which had left the ship, it seems very clear that, as nothing had been put on board

to take the place of that which was safely landed, only 43 per cent was lost of that on which the risk had originally attached. That is in effect what was decided in the Court below. Had other produce been partially put on board, it might have been a troublesome question, not of law but of fact, whether that which was partially put on board was the whole of what was intended to be substituted, or only a part of it. When the question arises it will be time enough to consider it. But the Court below had evidently that present to their mind, and they expressly point to that where they speak of the datum value of the full cargo intended *to be put on board. Had some other produce [*41] been put on board and the ship then lost, I hardly know how one could then get at this datum, except by a compromise or agreement between the parties. But that difficulty does not apply to the present case, for it seems to me to be clear enough that what was lost was 43 per cent of the cargo, and no more. That being so, I think the decision of the Court below was perfectly right, for the reasons I have stated. *Judgment affirmed.*

ENGLISH NOTES.

In *Forbes v. Aspinall*, No. 48 (at p. 675, *post*), Lord ELLENBOROUGH says: "An insurance on freight has no reference to the hull of the ship, or to its outfit for the voyage, both of which are protected by insurance upon the ship." But although "outfit" may be included in "ship," it is not included in "hull and machinery;" for these do not include disbursements for coals, provisions, and other stores. *Roddick v. Indemnity Mutual Marine Insurance Co.* (C. A. 1895), 1895, 2 Q. B. 380, 64 L. J. Q. B. 733, 72 L. T. 860, 44 W. R. 27.

AMERICAN NOTES.

Hill v. Patten is cited in 1 Parsons on Marine Insurance, p. 522, 525. Otherwise the principal cases are not cited by the leading text-writers on Insurance.

In *Paddock v. Franklin Ins. Co.*, 11 Pickering (Mass.), 229, SHAW, Ch. J., declined to give an opinion whether the term "cargo" would cover outfits on a whaling voyage. In *Pritchett v. Ins. Co.*, 3 Yeates (Penn.), 458, it was held under the usage of Philadelphia that profits were embraced by the term "goods."

Parsons says (1 Marine Insurance, p. 279): "The valuation of the freight of a ship is the valuation of the freight that the ship would earn by carrying a full cargo, or by letting to charter her whole burden. If it be other than this, it must be so expressed in the policy. The question may then arise, whether the whole of the interest included in the valuation was ever at risk, as in the

case of the valuation of goods it may be shown that only a part of the goods included in the valuation are on board, and then only a proportionate part of the valuation would apply. So if the freight of the whole ship be valued, it may be shown that the ship had on board only a part of the cargo, by the carrying of which the freight to which the valuation applied was to be earned, and then the valuation would be diminished *pro rata*." Citing *Forbes v. Aspinall*, 13 East, 324, which is approved in *Coolidge v. Gloucester M. Ins. Co.*, 15 Massachusetts, 341; *Wolcott v. Eagle Ins. Co.*, 4 Pickering (Mass.), 429: "If by mistake or design the assured should put on board only part of the goods to which he intended the valuation should apply, we think it clear that he should not recover as if the whole subject-matter of the valuation had been put on board; but that in case of loss he should recover such proportion of the valuation as the goods which were on board should bear to the whole valuation." "It has been contended for the plaintiffs, that as this was an insurance for a certain time, the assured could not be supposed to know how much property would be on board during the time; that it might vary; sometimes they might have much more, sometimes much less, than the valuation; and that what they should happen to have, more or less, at the time of the loss should be considered as the subject-matter of the valuation. But we are of opinion that this view of the case makes no difference, and that on every voyage which should be made during the term the same evidence of property or interest at risk should be required as if the property were upon that single voyage." The amount named in a valued policy is not conclusive where the loss is partial or the valuation is grossly excessive. *Watson v. Ins. Co.*, 3 Washington (U. S. Circ. Ct.), 1. If one insures property expected to be on board ship to a large amount upon a valued policy, and much less is in fact shipped, he is entitled in case of loss to recover only *pro rata*. *Alsop v. Com. Ins. Co.*, 1 Sumner (U. S. Circ. Ct.), 451. STORY, J., however says there that "in all cases of total losses, where there is a substantial interest and *bona fides*," a valued policy is "conclusive in respect to the value." "If the overvaluation be *bonâ fide* and innocent, the policy is good; if fraudulent, it is void."

In an insurance of freight, where the voyages consist of successive stages, the valuation is ordinarily to be taken as that of each successive freight, but it may be shown to be the aggregate of the successive freight. *Thwing v. Washington Ins. Co.*, 10 Gray (Mass.), 453.

In *Patapsco Ins. Co. v. Biscoe*, 7 Gill & Johnson (Maryland), 293; 28 Am. Dec. 219, it was held that a valued policy of insurance upon goods "laden or to be laden" on a vessel, "at and from Baltimore to Aux Cayes, with the privilege of one other port in the island of St. Domingo, and at and from either of them back to Baltimore," presents a case of distinct voyages and distinct freights at risk, and where the freight out is earned, and the vessel and cargo are lost on the return voyage, the insured is entitled to recover the full valuation in the policy. The Court cited *Riley v. Hartford Ins. Co.*, 2 Connecticut, 373, and *Davy v. Hallett*, 3 Caines (N. Y.), 16; 2 Am. Dec. 241, but admitted the principle that the goods must have been put on board, or at least contracted for and ready to be loaded, when the loss occurred. In the case last cited KENT, Ch. J., observed: "It is sufficient if there be freight at risk

No. 38. — Parmeter v. Cousins. — Rule.

equal to the sum insured when the loss happens, and that some freight has already been earned for the insured. If we were to sustain an inquiry into the value of the freight, it would be doing away the effect of the valued policy." "To apportion the loss and gain in this case so as to make the gain of one moiety of the outward freight inure to the insurer, and the loss of one moiety of the homeward freight to fall upon the insured, would be an arbitrary rule, and would not give the plaintiff his just indemnity. It would be changing the legal operation of this contract, and making it an insurance of one moiety only of the outward and one moiety of the homeward freight, instead of an insurance to the amount of the valuation on so much freight pending when the loss arose." "The policy was to be valid and operative so long as there was aliment to keep it alive." Precisely the same principle was declared in *Insurance Co. v. Mordecai*, 22 Howard (U. S. Sup. Ct.), 111, the Court citing the last two cases. This was an insurance in a valued policy on freight on a voyage from Charleston to Rio Janeiro, and thence to a port of discharge in the United States, and the vessel put back to Rio Janeiro on her return voyage, and was condemned and sold as unseaworthy. The Court said: "The insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation." The Court relied upon *Hugg v. Augusta Ins. & B. Co.*, 7 Howard (U. S. Sup. Ct.), 595, and *Columbian Ins. Co. v. Catlett*, 12 Wheaton (U. S. Sup. Ct.), 383. In the *Davy* and *Catlett* cases there was a double premium paid; but this was not regarded as essential in the others.

No. 38. — PARMETER v. COUSINS.

(1809.)

**No. 39. — DE WOLF v. ARCHANGEL MARITIME BANK
AND INSURANCE COMPANY.**

(1874.)

RULE.

WHERE a ship is insured for a voyage "at and from" a foreign port, these words do not import a warranty that the ship is at the port at the time of effecting the policy; but if she arrives there so late that the risk of the voyage contemplated is materially varied, the policy does not attach.

In order that such a policy should attach, it is also necessary that the ship arrive at the port in such physical

No. 38. — *Parmeter v. Cousins*, 2 Camp. 235, 236.

condition as to afford a reasonable prospect of safety until she is properly repaired and equipped for the voyage.

Parmeter v. Cousins.

2 Camp. 235-237 (11 R. R. 702).

Insurance. — “*At and from*” *Foreign Port*.

[235] Policy at and from the island of St. Michael's. The ship arrived there in a very disabled state, and after lying at anchor above twenty-four hours in great danger from a storm, was blown out to sea and wrecked. *Held*, that the policy on the homeward voyage never attached.

This was an action on a policy of insurance on ship and freight, valued at £1200, at and from St. Michael's, or all or any of the western islands, to England.

The ship met with very tempestuous weather on her outward voyage; and when she arrived at St. Michael's she was so leaky that the crew were obliged to work at the pumps spell [*236] and spell. She was then quite in *an unfit state to take in a cargo, and there being no harbour in the island, she was in great danger from the storm, which still continued. In fact, after lying at anchor above twenty-four hours, she was blown out to sea and was wrecked.

Park for the plaintiff contended that the underwriters were clearly answerable for a loss so happening. The policy being *at* as well as *from*, attached the moment the ship cast anchor at St. Michael's; and at any rate she had lain there twenty-four hours, so that the outward risk had completely expired. The objection of want of seaworthiness when properly considered was without any foundation. The ship, on her arrival at St. Michael's, was unfit to commence the homeward voyage; but this was unnecessary. It was enough if she was fit for the voyage when the voyage commenced. One state of seaworthiness was required while she remained *at*, and another when she sailed *from*, the place. This distinction had been settled by Lord KENYON (*Forbes v. Wilson*, Park, 299 n., Marsh. 155; *Smith v. Surridge*, 4 Esp. 25 [6 R. R. 837]), and recognised by Lord ELLENBOROUGH (*Hibbert v. Martin*, 1 Camp. 538). If it were not allowed, the policies on the homeward voyage would in almost every instance be vitiated; as it seldom happens that a ship on her arrival at the outward port wants no repairs, but is in a condition imme-

diately to take in the homeward cargo. If, in this case, the policy on the outward voyage had expired, and the policy on the homeward voyage had *not attached, how was [*237] the ship-owner to secure himself an indemnity during the whole course of the adventure?

LORD ELLENBOROUGH. — What we have to consider here is; whether the underwriters on this ship, at and from St. Michael's to England, be liable for a loss happening in the manner that has been described? And I am clearly of opinion that they are not. To be sure, while the ship remains at the place, a state of repair and equipment may be sufficient, which would constitute unseaworthiness after the commencement of the voyage. But while in port she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage. She must have once been at the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches. Such is the present case. I do not remember any one like it; but the principles on which it must be decided are perfectly well established.¹

Plaintiff nonsuited.

Park and Richardson for the plaintiff.

The Attorney-General, Garrow, Scarlett, Barrow, and F. Pollock, for the defendant.

De Wolf v. Archangel Maritime Bank and Insurance Company.

L. R. 9 Q. B. 451-457 (s. c. 43 L. J. Q. B. 147; 39 L. T. 605; 22 W. R. 801).

Marine Insurance. — “At and from.” — *Unreasonable Delay in reaching Port.*

In a policy of insurance “at and from” a port, it is an implied under- [451] standing that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such time, the policy does not attach.

¹ In *Motteaux v. The London Assurance Co.*, 1 Atk. 548 (p. 467, *ante*), Lord Chancellor HARDWICKE says that a case came before him *when Chief Jus- [*238] tice at Guildhall, in which it was debated, “whether at and from Bengal to England, meant the first arrival of the ship at Bengal? And it was agreed the words ‘first arrival’ were implied and always understood in policies.” I do not find anything more in the books concerning the time at which the policy on ship, at

and from a foreign port, attaches; and there seems no doubt that the rule laid down by Lord HARDWICKE, qualified by the case of *Parmeter v. Cousins*, is to be considered as established law upon the subject. But perhaps it might have been better to have held that the policy on the homeward voyage commences at the time when that on the outward voyage expires. Suppose a ship to arrive safely at the outward port, and to be wrecked or captured before she has been moored twenty-four

No. 39. — *De Wolf v. Archangel Mar. Bk. and Ins. Co.*, L. R. 9 Q. B. 451, 452.

Declaration on a policy of insurance, dated the 12th of July, 1872, upon chartered freight in a ship called the *Florence Chapman*, at and from Montreal to Monte Video.

Plea (amongst others), that at the time of making the policy the ship was not, nor did the ship within a reasonable time thereafter arrive, at Montreal, and great and unreasonable delay occurred before the ship arrived at Montreal, being a delay which was material to the risk of the policy, and by reason thereof the policy at the commencement of the risk had not attached.

Issue joined.

At the trial, in the Mayor's Court, before the COMMON SERGEANT, a verdict was found for the defendants with leave to the plaintiff to move.

A rule was afterwards obtained by the plaintiff for a new trial, on the ground that the COMMON SERGEANT misdirected the jury, first, in not leaving to them the question whether the delay in commencing the risk was justified by necessity; secondly, in directing them that the only question was whether such delay altered the risk.

April 30. C. Bowen showed cause.

Benjamin, Q. C., and Aspland supported the rule.

The facts, the course at the trial, and the arguments sufficiently appear in the judgment of the Court.

In addition to the authorities referred to in the judgment, the following were cited: *Small v. Gibson*, 16 Q. B., at p. [*452] 156, 19 L. J. Q. B. 147; *Beckwith v. *Sydebotham*, 1 Camp. 116 (10 R. R. 652); *Grant v. King*, 4 Esp. 175 (6 R. R. 849); *Phillips v. Irving*, 7 M. & G. 325; *Jones v. Neptune Marine Insurance Co.*, L. R. 7 Q. B. 702, 41 L. J. Q. B. 370.

[BLACKBURN, J., referred to *Jackson v. Union Marine Insurance Co.*, L. R. 8 C. P. 572.] *Cur. adv. vult.*

June 8. The judgment of the Court (COCKBURN, Ch. J., BLACKBURN and LUSH, JJ.) was delivered by

BLACKBURN, J. — This was an action tried in the Mayor's Court before the COMMON SERGEANT.

hours in good safety, the assured being more than ordinarily protected during this period, may make their election between the underwriters on the outward or on the

homeward voyage, and some confusion, if not injustice, may arise in finally adjusting the loss. — Note by reporter (afterwards Lord CAMPBELL).

No. 39. — *De Wolf v. Archangel Mar. Bk. and Ins. Co.*, L. R. 9 Q. B. 452, 453.

The action was on a voyage policy on ship "at and from Montreal to Monte Video."

The 4th plea, on which alone the question before us arises, was that the ship was not at Montreal within a reasonable time, being a delay materially varying the risk. The facts as to this were that the policy was effected on the 13th of July at a premium of 2 per cent. No question was asked by the underwriter as to where the ship then was, and no information was offered by the assured; but in fact she was then at sea on a voyage intended to end at Montreal. She did not arrive at Montreal till the 30th of August. Evidence was given that the delay in the arrival at Montreal changed the voyage from a summer one to a winter one, which materially affected the risk and the rate of premium.

Evidence was offered on the part of the plaintiff that the delay in arriving at Montreal was not voluntary on his part, but was occasioned by perils of the seas on the voyage out to Montreal.

The COMMON SERGEANT rejected this evidence, giving leave to the plaintiff to move in this Court for a new trial on this ground.

The case was then left to the jury, who found that the delay was unreasonable, and that the risk was thereby materially changed.

A rule *nisi* was obtained for a new trial, which was argued in last term before my Lord and my Brother LUSH and myself, when the Court took time to consider.

As the evidence was rejected, we must consider the case as if it had been received, and had established what it was offered to *prove, and as if the jury had found not only as [*453] they have done that there was unreasonable delay between the making of the policy and the commencement of the risk intended to be insured against, materially altering that risk, but also that the delay was occasioned by matters beyond the control of the assured. And then we have to determine whether that would be a defence or not.

Nothing would seem easier than for the parties making a policy to insert a few words preventing all possibility of dispute on such a point. If the insurance had been in this case at 5 per cent, to return 3 per cent if the ship was at Montreal on or before some named day, there would have been no question but that the underwriters would in this case have been liable, and the assured would not have had to pay the winter premium unless the underwriter

ran the winter risk. If the underwriters had inserted "warranted to be at Montreal on or before" some named day, there can be no doubt that the risk would not have attached; and in either case, by naming a fixed day, the controversy as to when the risk became varied would be avoided. But we are informed that in practice there are great if not insuperable difficulties in the way of introducing unusual clauses into policies, and that brokers prefer the risk of causing litigation at the expense of their customers to the risk of frightening away custom by proposing something unusual. We must anticipate that policies will continue to be made as this has been; and the question before us is therefore one of considerable importance.

It is quite clear that the words "at and from a particular place" do not import either a warranty or a representation that the vessel at the time of making the policy is already at the place. In *Hull v. Cooper*, 14 East, 479 (13 R. R. 287), decided in 1811, the case was one of an insurance on goods, "at and from Heligoland to a port in the Baltic." At the time when the policy was effected, the 13th of August, the ship was in the Thames, which fact was known to the assured, and not communicated. She did not sail from the Thames till the 27th of August, a fortnight later, which latter fact could not have been known to the assured at the time of making the policy, as it had not then happened. The plaintiff having obtained a verdict, a [*454] *motion for a new trial was refused. It appears from the report as if the counsel who moved treated the case entirely as one of concealment, and not as one of a change of risk; but Lord ELLENBOROUGH in his judgment separates the two questions. He says: "When a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there; for if she is only to be there at a distant period, that might materially increase the risk. But it has never been understood that the terms of such a policy necessarily imported that the ship was at the place at the very time, so as to make the assured guilty of deception if she were not." So far he is dealing with the non-disclosure of the fact that the ship was in the Thames on the 13th of August. He then proceeds: "It was a question for the jury whether the intervening period materially varied the risk in this instance; the interval being from the 13th to the 27th of August,

with the additional days which elapsed from the sailing till she reached Heligoland. And the jury were not persuaded that the risk was thereby varied, and found for the plaintiff." And BAYLEY, J., says, "It was a question for the jury whether the delay in reaching Heligoland for so many days after the policy was effected materially varied the risk." The affirmative decision here is, that a delay not varying the risk does not discharge the underwriter; but the opinion is expressed that a delay materially varying the risk does discharge the underwriter, though that was not the very point decided.

In *Driscoll v. Passmore*, 1 Bos. & P. 200 (4 R. R. 782), decided in 1798, where an analogous question arose and the plaintiff recovered, it is stated in the report that "it was in evidence that the difference of season arising from this delay did not vary the risk." *Brine v. Featherstone*, 4 Taunt. 869 (14 R. R. 689), came before the Court on a rule to enter the verdict on a point reserved at the trial, and the Court *in banc* had not to consider whether the delay was such as to discharge the underwriters. The facts, as stated in the report, appear to be such as would have afforded evidence that the delay was such as to vary the risk; but if that defence was raised at Nisi Prius, which does not appear to have been the case, there may have been some other evidence not stated in the report which justified the finding of the *jury. Neither of those cases can, as we [*455] think, be considered in conflict with *Hull v. Cooper*.

The case, however, that comes nearest to the present is that of *Mount v. Larkins*, 8 Bing. 108. In that case the facts were found in a special verdict, a part of which only is set forth in the report. The policy was on the ship *Aquila*, at and from Singapore and Batavia, both or either, to the ship's port of discharge in Europe. In the report it is said that it was found that the policy was entered into on the 28th of February, 1824; that the ship sailed from England in the beginning of September, 1823, on a voyage to the Cape of Good Hope, Van Diemen's Land and Sydney, and thence to Singapore. It is not stated in the report that it was known to the underwriters that she was bound on this preliminary voyage, but it is scarcely possible that it should be otherwise; and in the judgment of the Court it is assumed throughout that it was known to them. The jury found that there was "unreasonable and unjustifiable delay between the

making of the policy of assurance and the commencement of the risk intended to be insured against." On this the Court of Common Pleas decided in favour of the defendants, saying, "We must intend that the risk was in fact varied, and consequently the underwriters discharged." This would be precisely in point were it not that it was there expressly found that the delay was unjustifiable, and that in the present case the plaintiff has not been allowed to give evidence to show that the delay was not from any fault of his. The ground on which the judgment delivered by TINDAL, Ch. J., in *Mount v. Larkins*, 8 Bing., at p. 122, is based is that "The underwriter has as much right to calculate upon the outward voyage on which the ship is then engaged being performed in a reasonable time and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as to the underwriter, who has another risk substituted instead of that which he has insured against, and in both cases the alteration is occasioned by the wrongful act of the insured himself." This may be relied on as an expression of opinion that the delay, if necessary, would not discharge the underwriters. It

[* 456] may be so where the fact that *the vessel is on a preliminary voyage is known and communicated to the underwriter, so as to make that the basis of the contract; and it seems to have been understood by TINDAL, Ch. J., that the principle on which the cases of *Vallance v. Dewar*, 1 Camp. 503 (10 R. R. 738), and *Ougier v. Jennings*, 1 Camp. 505 *n.* (10 R. R. 739 *n.*), were decided was on the ground of notice. He says in both those cases, "It is admitted that a delay in the commencement of the risk, by the interposition of an intermediate voyage not communicated to the underwriters, would discharge the policy, unless such intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters."

We need not in the present case decide how that is, for there was no communication made to the underwriters as to where the ship was at the time when the policy was made. And we think it, under such circumstances, not material whether the delay which varies the risk was occasioned by the fault or the misfortune of the assured. In either case the risk is equally varied.

No. 39. — *De Wolf v. Archangel Mar. Bk. and Ins. Co.*, L. R. 9 Q. B. 456, 457.

Where the alteration in the course of the voyage after the risk has attached is justified by necessity, it does not vary the risk. The underwriter has undertaken to insure the vessel during the usual and proper course of the adventure. Now, though under ordinary circumstances the usual proper course of a voyage is to proceed direct, or, if chased by a hostile cruiser, or forced to run before a storm, to go out of the direct course the underwriter takes his chance of the vessel being forced to do so. But the underwriter does not take upon himself any part of the risk of the vessel being delayed so long as to vary the risk, by perils of the sea or otherwise, on its passage to the port where the risk is to attach. This seems involved in the decision of *Hull v. Cooper*, 14 East, 479 (13 R. R. 287), that the assured is not bound to communicate to the underwriter the place where the vessel is at the time of insurance. For, if the time when the risk is to attach might be indefinitely delayed by perils affecting the passage from the place where the vessel was, it must be material to the underwriter to know what that place is. If, on the other hand, at whatever place the ship then is, the risk* is not [*457] to attach unless the vessel in fact arrives at the port within a proper time, it is not material to the underwriter at what place the ship then is.

The position is laid down in Phillips on Insurance, vol. i., p. 379, s. 690, "that it is an implied understanding that the risk is to commence within a reasonable time, unless the policy contains some express provision on the subject." He elsewhere, vol. i., p. 332, s. 602, expresses a hesitating opinion that a representation, though not embodied in the policy, may have the effect of qualifying or rebutting an understanding that is only implied. As already said, we are not now called upon to decide how this may be, as in the present case there was neither representation nor express provision in the policy. We think, at all events, in the absence of a representation, that in a policy "at and from a port," it is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied, otherwise the risk does not attach.

The rule therefore must be discharged.

Rule discharged.

ENGLISH NOTES.

“Where a ship is insured at and from a place, and it arrives at that place, so long as the ship is preparing for the voyage upon which it is insured, the insurer is liable; but if all thoughts of the voyage are laid aside, and the ship lies there five, six, or seven years, with the owner’s privity, it shall never be said that the insurer is liable; for it would be very absurd to make him suffer for the whim or caprice of the owner, who chooses to let the ship lie and rot there.” Per Lord Chancellor HARDWICKE, in *Chitty v. Selwyn* (1742), 2 Atk. 359.

“The safety required to give a good commencement to the risk on the ship is a physical safety from the perils insured against, and not a freedom from political danger.” Per Lord ELLENBOROUGH, in *Bell v. Bell* (1810), 2 Camp. 475, 478, 11 R. R. 769.

In an insurance “at and from” an outward port for the homeward voyage, the words “first arrival” are always implied. *Motteaux v. London Assurance Co.*, No. 20, p. 467, *ante*. That is to say, if she arrives in such a condition as to be reasonably safe in harbour, although not seaworthy for the voyage, she is protected by the word “at,” the implied warranty of seaworthiness for the voyage only attaching when she sails. *Annen v. Woodman* (1810), 3 Taunt. 299, 12 R. R. 663. See also *Smith v. Surridge* (1801), 4 Esp. 25, 6 R. R. 837. And the policy attaches as soon as the vessel arrives within the port, although she has not been safely moored, or arrived at the place of discharge. *Haughton v. Empire Marine Insurance Co.* (1866), L. R. 1 Ex. 206, 35 L. J. Ex. 117, 15 L. T. 80, 14 W. R. 645.

But the presumption that the policy attaches upon first arrival may be controlled by a notorious usage of the particular trade. This was shown in the case of *Vallance v. Dewar* (1808), 1 Camp. 503, 10 R. R. 738, where a policy was effected on the 28th of August upon a ship, freight, and cargo, “lost or not lost at and from any port or ports in Newfoundland to a port of discharge in Portugal.” The ship had arrived at Newfoundland in June, and was employed, according to the usage of the trade, in banking or fishing for some months before taking in a homeward cargo. She continued this employment until October 13, when she began to take in a homeward cargo; and she sailed for England on the 22d of December, and soon afterwards foundered in a gale. The point was taken on the part of the defence that the risk had commenced and the policy attached immediately on the termination of the outward voyage, and that the delay in sailing home was a deviation. It was also shown to be part of the usage that vessels while employed in banking were covered by a separate and distinct policy. Lord ELLENBOROUGH held that the underwriters were bound by the

usage, and that the policy did not attach until the ship was preparing for the homeward voyage; and, there being no delay after that, the underwriters were liable. The judgment followed a judgment of Lord ELDON in a somewhat similar case. *Ougier v. Jennings* (C. P. 1800), which is cited in a note, 1 Camp. 505 n., 10 R. R. 739 n.

A ship engaged in a privateering adventure, with instructions on the termination of the cruise to bring home a cargo of merchandise, was insured "at and from Pernambuco or any other port or ports in the Brazils to London, beginning the adventure on the termination of her cruise and preparing for her voyage to London." The ship, having terminated her cruise, stood off Pernambuco, where she sent in an officer to inquire whether she could get a homeward cargo, and finding she could not, stood for St. Salvador, a port of Brazil, intending to try for a cargo there, and in the passage thither was lost. It was held that the policy had attached. *Lambert v. Liddard* (1814), 5 Taunt. 480, 1 Marsh. 149, 15 R. R. 557.

In a policy "at and from a port or ports" within certain limits, the word "port" is satisfied by a roadstead where it is usual for ships of similar burden to load and unload; and the policy attaches on the arrival in the roadstead of the ship ready to commence loading. *Sea Insurance Co. v. Gavin* (appeal from Scotland, 1830), 2 Dow & Cl. 125; and see *Cockey v. Atkinson* (1819), 2 B. & Ald. 460, 21 R. R. 357; *Harrower v. Hutchinson* (1869, 1870), L. R. 4 Q. B. 523, 5 Q. B. 584, 39 L. J. Q. B. 229, 22 L. T. 684.

"If the ship is insured 'at and from' a home port in which the ship is then lying, the risk commences on the ship immediately upon the execution of the policy, and continues during the whole time the ship remains in the home port in a course of preparation for her voyage." Arnould on Insurance, 6th ed., p. 404, referring to *Motteaux v. London Assurance Co.*, No. 20, p. 467, *ante*; *Palmer v. Marshall* (1831, 1832), 8 Bing. 79, 317. In the latter case there was an insurance of a yacht, "at and from Bristol to London." The insurance was made in January, when the vessel was lying afloat at Bristol. But she did not sail for London until May. At the first trial a verdict was found for the plaintiff, which was set aside by the Court. At the second trial PARK, J., nonsuited the plaintiff, and his ruling was upheld by the Court *in banc*. In giving judgment TINDAL, Ch. J., said: "A policy effected in these terms, and in this shape, implies that the voyage insured shall be very shortly commenced, or is at all events in the near contemplation of the parties; and when we see that in the present instance the voyage was not commenced till the middle of May, we are bound to say that the delay was unreasonable unless it be accounted for. No doubt, whether there has been unreasonable delay or not, is properly a ques-

tion for a jury; and I take it up, therefore, as if it had been left to the jury, with a strong direction that the delay here was unreasonable. What I have to consider, therefore, is whether any facts have been stated by the plaintiff to account for this delay. I find none suggested beyond the circumstance, that this vessel was described as a yacht upon the policy; and that yachts are usually laid up in winter. But if the plaintiff meant to rely on that, he should have taken a policy adapted to his purpose. He might have insured his vessel *in port* for a definite time, and on the voyage to be commenced afterwards; instead of that he adopts a form of policy from which the underwriter must have understood that the vessel would sail within a reasonable time. Here the vessel lies by for more than three months, during which, in addition to the risk of the voyage, the underwriter is exposed to the risk of every accident which may happen in port. Where the delay is unexplained, and so great as to fix it with the character of unreasonableness in the mind of every reasonable person, the strongest direction to the jury and a verdict for the defendant would be fully justified." ALDERSON, J., said: "Upon a policy like this, a delay in sailing in order to be justified must be a delay incurred for the purpose of the voyage, as in *Langhorn v. Allnutt*, 4 Taunt. 511 (13 R. R. 663), where it was necessary to wait for the purpose of procuring simulated papers, without which the voyage could not be performed; or in *Raine v. Bell*, 9 East, 195 (9 R. R. 533), where the vessel waited for the purpose of taking in provisions. But here the vessel was afloat; no reason connected with the voyage is assigned for her remaining in port; and the risk of the underwriter is materially changed. Instead of the risk of a voyage performed within a reasonable time after the 28th of January, the plaintiff has substituted the risk of lying in the port of Bristol more than three months, and a voyage at a different time." A similar decision was given in *Palmer v. Fenning* (1833), 9 Bing. 460, an action upon the same policy against another underwriter, where the Court, after a verdict for the plaintiff, directed a new trial. PARK, J., in his judgment, adopted what was said by TINDAL, Ch. J., and ALDERSON, J., in *Palmer v. Marshall*, *supra*.

AMERICAN NOTES.

Parmeter v. Cousins is cited in 1 Parsons on Marine Insurance, p. 386, and approved in *Kemble v. Bowne*, 1 Caines (N. Y.), 75.

"Whilst a ship is insured at a port, a state of repair and equipment is sufficient which would be unseaworthiness for going to sea. But she must be in such a condition as to be in reasonable security. If she be a mere wreck, the policy never attaches." (Citing *Parmeter v. Cousins*.) *Paddock v. Franklin Ins. Co.*, 11 Pickering (Mass.), 232.

No. 40. — *Hurry v. Royal Exchange Assurance Co.* — Rule.

There is no implied warranty of seaworthiness at the time of receiving the cargo, but only at the time of sailing. *Merchants' Ins. Co. v. Clapp*, 11 Pickering (Mass.), 56; *M'Lanahan v. Universal Ins. Co.*, 1 Peters (U. S. Sup. Ct.), 184; *Taylor v. Lowell*, 3 Massachusetts, 348; *Cobb v. N. E. M. M. Ins. Co.*, 6 Gray (Mass.), 199, a case of insurance on a vessel in course of building, where the Court said: "She did not sail from Perry as a finished vessel, nor from the contract, viewed in the light of the surrounding facts, could it have been expected that she should. But she was seaworthy in the sense that she was fit for the service in which she was for the time engaged. She was in a fit condition at Perry to go to Eastport in the usual way; she was in a fit condition before she left Eastport to go to New York." So in *Taylor v. Lowell*, 3 Massachusetts, 334; *Garrigues v. Coxe*, 1 Binney (Penn.), 592. (The trial Judge in that case charged that upon an insurance "at and from" a foreign port, the risk commences as soon as the vessel has been safely moored twenty-four hours after arrival at port.)

"The true rule on this subject is that *at and from*, when applied to a ship, includes the period of her stay in port from the time of her arrival there. But *at and from*, when applied to goods, means from the time those goods are put on board the vessel." KENT, J., in *Patrick v. Ludlow*, 3 Johnson Cases (N. Y.), 14.

Insurance on a vessel "at and from Calais, Maine, to July 16, to, at, and from all places to which she may proceed in the coasting business for six months," attaches on the day named, whether the vessel was then prosecuting her voyage or not, if it appears that the intent was to insure for a stated time, irrespective of the place where the vessel happened to be. *Martin v. Fishing Ins. Co.*, 20 Pickering (Mass.), 389; 32 Am. Dec. 220.

No. 40. — HURRY *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

(C. P. 1801.)

No. 41. — STRONG *v.* NATALLY.

(C. P. 1804.)

RULE.

UNDER the usual clause for the insurance of goods, "to continue . . . until the same be there discharged and safely landed," the goods continue to be protected by the policy while they are being carried in boats or lighters to the shore, according to the usual practice of the trade.

But if the merchant interferes with the usual course of landing, and takes the goods into his own care and

No. 40. — *Hurry v. Royal Exchange Assurance Co.*, 2 Bos. & P. 430, 431.

possession, whether by sending his own private lighter for them or otherwise, the insurer is discharged.

Hurry v. Royal Exchange Assurance Company.

2 Bos. & P. 430-437 (5 R. R. 639).

Insurance. — Goods. — Until discharged and safely landed.

[430] Insurance on goods from A. to B., "until they should be there discharged and safely landed;" on their arrival at B., the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss.

This was an action on a policy of assurance on ship and goods from Petersburg to London, including the risk of boats to Cronstadt, beginning the adventure on the said goods and merchandises from and immediately following the loading thereof on board the said boats at Petersburg, and on the ship at Cronstadt; to continue upon the ship until she should be arrived at London, and had there moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until they should be there discharged and safely landed.

The cause was tried before Lord ELDON, Ch. J., at the Guildhall Sittings after last Hilary Term, when it appeared that the ship and cargo (consisting of hemp) arrived in safety in the river Thames; that the plaintiffs, being the consignees of the goods, by their broker employed and paid a lighterman belonging to one of the public lighters entered at Waterman's Hall to land the hemp; that the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the Russian trade to land their goods by means of lighters, and that there are no other lighters now in use among the merchants but the public [* 431] lighters. A verdict was found for *the plaintiffs, with liberty to the defendants to move to have a nonsuit entered on the ground of the insurance being discharged by the delivery of the hemp to the lighters employed and paid by the consignees of the cargo.

Accordingly a rule *nisi* having been obtained on a former day, Shepherd, Heywood, and Bayley, Serjts., now showed cause.

The question is, Whether the damage which the goods sustained on board the lighter be one of the risks insured against by this policy? It must be admitted that if the loss had happened on board one of the ship's boats the underwriters would have been liable; it is not therefore necessary that the loss should happen on board the ship itself, but it is sufficient if it happen in the ordinary course of conveying the goods on shore. In the case of *Pelly v. The Royal Exchange Assurance Company*, 1 Bur. 341, the goods having been placed in a warehouse built on a sand-bank in the river of Canton in China, while the ship was repairing, were destroyed by fire; yet as that unloading of the goods appeared to have been in the ordinary course of the voyage, the Court held the underwriters liable; and Lord MANSFIELD there cited a case of *Tierney v. Etherington*, before LEE, Ch. J., where it was ruled that a loss happening on board a store-ship at Gibraltar was covered by a policy containing an agreement that upon the arrival of the ship at Gibraltar the goods might be unloaded and re-shipped in one or more British ship or ships for England or Holland. The expressions of LEE, Ch. J., were, "The construction shall be according to the course of trade in this place, and this appears to be the usual mode of unloading and reshipping in this place, viz., that when there is no British ship there, then the goods are kept in store-ships." Indeed the Court will attach that meaning to the words "safely landed," which the course of trade puts upon them; and Lord MANSFIELD, in 1 Bur. 348, says, "When goods are insured till landed without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore." It is true that the case of *Sparrow v. Carruthers*, 2 Str. 1236, seems to be an authority in the defendant's favour, since it was there holden that the owner of the goods by landing them in his lighter discharged the underwriters. But with respect to that case it may be observed that it was only a Nisi Prius decision, that the doctrine of LEE, Ch. J., in *Tierney v. Etherington*, is inconsistent * with [*432] that laid down by him in *Sparrow v. Carruthers*, that it is contradicted by a case of *Langlois v. Brant*, before WILLES, Ch. J., and that even supposing it to be good law, still it is not an authority in the present case, since as the lighter there belonged to the owner of the goods he might be considered as having taken them into his own custody, whereas the lighter in

the present case was a public lighter employed in the usual course of trade. This distinction is expressly recognised by BULLER, J., in the case of *Rucker v. The London Assurance Company*.¹

¹ *Rucker v. London Assurance Company*. At Guildhall, Tuesday, 8th June, 1784. *Coram* BULLER, J.

This was an action on a policy of insurance on the *Eliza-Sophia*, at and from Grenada to London, on the ship until moored twenty-four hours, and on goods until safe discharged and landed, and the declaration stated, that before the goods, viz. hogsheads of sugar, were safely discharged and landed, they by the perils of the river Thames and the waters thereof were washed away and lost.

The several wharves between London Bridge and the Tower are called Free Quays, at which only foreign produce liable to pay duties can be landed. The owners of most of these quays entered into a partnership, which was to expire at Lady-day then next; and not only did the business of wharfingers, but of lightermen, employing their own lighters in discharging such vessels as were to land goods at their wharves. The owners of some of the wharves, not of the company, have also their own lighters, while the owners of others are not possessed of lighters of their own, but employ public lightermen. When a ship arrives in the river, the first thing that is done is to quay the ship. When a ship is quayed at a wharf belonging to one of the company, the company provides lighters and does all that is necessary for landing: when at a wharf not belonging to any of the company, the owners provide lighters, &c. All the wharves do not keep lighters or employ the company, but employ persons having lighters but no wharf, as Drinkall, the person who was employed here by the plaintiffs. It is not usual for merchants to employ lightermen, they usually leave it to the wharfinger, but Hibbert's house (and that only) generally employs one lighterman.

The plaintiff applied to the agent for the company of wharfingers to land the sugars in question, but they not being able to undertake the business, and the plaintiff fearing the ship might be kept on demurrage, one Drinkall, who followed the busi-

ness of a lighterman, was applied to by him with consent of the company. Drinkall's usual business was to work out rums, and he has been often employed by the company, and on this occasion was, when applied to, employed by them in working out the ship *Experiment*, but as a favour he left her, to work out the sugars. Drinkall was a public lighterman for hire, and his lighter was numbered at Waterman's Hall, without which no lighter could be allowed to work. On the 30th of September, fifty-seven hogsheads of sugar were put on board his lighter, and there were two men on board (which are the usual number for a lighter), and the second mate of the ship; as she was proceeding to the shore she struck upon the anchor of a ship, and sunk through an unavoidable accident, without any imputation of neglect in anybody on board. The sugars were of course much damaged, and this action was brought to recover an average loss of — per cent.

Bearcroft for the defendants contended, that, strictly speaking, the policy extended till the goods were landed by the ship's boats, but that the custom of trade had for convenience substituted something else, viz. lighters. The custom here had not been complied with; for there was an important difference in the merchant taking upon himself to employ lightermen: this was not the course of trade, and the defendants were thereby completely discharged from the subsequent loss. A merchant may give up the custom, and the plaintiff has done it here. In the common course of trade he could not have got discharged under a week. "Then," says he, "I dismiss every advantage from the custom, I discharge the underwriters for my own reasons and my own benefit." The freight is due (and it is only due when the voyage is ended) when the goods are delivered to his lighter. If the plaintiff's own lighter had been sent, it would not have been in the course of trade, and this is in effect the same thing.

BULLER, J., told the jury that the decision of this cause depended on the usage,

*Lens and Best, Serjts., in support of the rule. — The [*433] principle of law laid down in *Sparrow v. Carruthers* must now prevail. It seems to be settled that if the goods are received out of the ship in private lighters the underwriters are discharged. Now the only ground upon which this position can be supported is, that the possession of the goods has been altered, and the owner has taken them into his own custody. If this be the principle, it can make no difference whether the lighter be public or private; for the person who hires a public lighter for the conveyance of his own goods, makes that lighter as much his own *pro hac vice* as a private lighter, and the goods while *on board are completely in his own custody. This case, [*434] therefore, does not depend upon the question whether the goods have been taken out of the usual course of the voyage, but whether the plaintiff has not received them into his own custody

but the fact of the usage once established, the question, whether the underwriter is liable or not, was matter of law. But it belonged to the jury to say whether what had been done here was or was not in the usual course of trade. There is no distinction between a public and private wharf, for a ship may go to either, and underwriters are equally liable at both. If she goes to a private wharf the public lightermen are not employed, so that there are cases in which the underwriters would be liable when the company is not employed. It is merely a voluntary society, and these lighters are not on a different footing in any respect from the rest of the lighters. If then that is not the line, what is? The line is between lighters which are public, and lighters which are the property of the merchants, and work only for them. The public lighters have a stamp of authenticity, they are entered at Waterman's Hall, as Drinkall's was, and have a public credit. The case in *Strange* (*Sparrow v. Carruthers*) does not interfere. If a merchant will not send public lighters entered at Waterman's Hall, it shall be a delivery to the merchant when the goods are put on board his lighter; but not if he sends lightermen appointed by the Waterman's Company, and who are public officers. In the case in *Strange* the lighter is said to be the property of the plaintiffs, and one expression of the Chief Justice

is, that it would have been otherwise had the goods been sent by the ship's boat, *i. e.* the lighter of the ship employed to discharge her, for it could not be the ship's boat, literally speaking, because it would be impossible it could discharge a whole cargo.

If the jury were of this opinion, he directed them to find for the plaintiff.

Verdict for the plaintiff.

Mr. J. BULLER, before the opening of plaintiff's case was finished, asked if the point in the cause had not been decided several times since he attended Guildhall?

Bearcroft, for the defendants, mentioned *Sparrow and Carruthers* as in point.

BULLER, J. This has been determined some way or other, and I think differently in two cases. If the lighter does not belong to a public company but to the master of the goods himself, the underwriters are not liable; but if the lighterman is a public officer, they are liable.

Lee, for the plaintiff, cited from his own notes the case of *Langlois and Brant* before Lord Ch. J. WILLES, which was a much stronger case than *Sparrow v. Carruthers*. The policy was from Jamaica to — and till landed. The consignee sent his own lighter, and negligence was proved, and a special jury found against the underwriters.

before they were actually landed, and thereby discharged the underwriters from the remainder of the risk. Undoubtedly if the lighter employed in this case had been employed by the ship-owner, the delivery of the goods would not have been complete until they were safely landed; but if the merchant find it inconvenient to wait for the delivery of the goods by the ship-owner, but chooses to receive them into a lighter, whether public or private, he by that act puts an end to the voyage. Neither in *Pelly v. The Royal Exchange Assurance Company*, nor in *Tierney v. Etherington*, could it be said that the goods had been delivered into the possession of the owners, since the loss in both cases happened in the middle of the voyage. With respect to the opinion of Mr. J. BULLER in *Rucker v. The London Assurance Company*, it is to be observed that the learned Judge lays great stress on the circumstance of the lighter having been entered at Waterman's Hall, and considers the lighterman as a public officer, whereas that circumstance gives no publicity of character to the lighter, but only makes the owner amenable to the regulations of the company for misconduct in the river, who is no more a public officer than a hackney coachman. As to the note which has been referred to of *Langlois v. Brant*, it is not entitled to any credit, since it is there said that negligence was proved, and yet that the underwriters were held liable.

HEATH, J.—The question in this case is, whether the goods insured have been safely landed within the true intent and meaning of those words in the policy, for to every part of the policy we must give complete effect. Now if we were to hold that the insurers were discharged by the delivery of the goods to the lighter, we should defeat the words "safely landed," and render them altogether nugatory. It is admitted that the business of unloading the Russian ships is carried on by public lighters, and that no private lighters are ever employed by the merchants. Now if that be so, what effect is to be given to the words "until the goods are safely landed," if they do not extend to the goods when on board the public lighter, for in no other manner [*435] can they be safely landed. It is true that the *master and owners of the ship were discharged when the goods were put on board the lighter; but freight and insurances are not commensurate; the latter is far more extensive than the former. The insurance commences before the freight, for it commences

when the goods are put on board the boats at Petersburg, and it also continues longer than the freight, for it does not determine until the goods are safely landed. There is no pretence for saying that if the freighter of the goods had made use of his own boats in putting the goods on board at Cronstadt the insurers would have been thereby discharged. It has been argued, however, that whenever the custody of the goods is changed, the insurance is at an end; but that argument is founded on the notion of freight and insurance being coextensive. With respect to the case of *Sparrow v. Carruthers*, I think it ought not to be extended; it was only a *Nisi Prius* decision; it has been cited several times, but never recognised, and whenever it has been cited great pains have been taken to distinguish it from the cases before the Court, though perhaps not always with success. I do not mean, however, to quarrel with that decision; a case precisely similar is not likely to arise again, since it is not customary for the owners of goods to send their own lighters, but always to employ public lighters.

ROOKE, J.—I am of the same opinion. The words of this policy are, that the underwriters shall continue liable until the goods are safely landed; now I think it is going too far to say, that when the goods are put on board the lighter they are safely landed. I cannot agree that this case depends on the question, who employs the lighter? It appears to me to depend upon the question, what the lighter is? For whether the lighter be employed by the owner of the goods or the owner of the ship, the landing of the goods is equally dangerous, and the risk of the underwriters the same. The criterion seems to be, whether it is a public lighter, publicly registered, and, in short, that sort of lighter which is equally known to the underwriters and the owner of the goods. It is certainly much for the benefit of the underwriters that this construction should prevail, since it is desirable for him that the merchant should as much as possible facilitate the landing of the goods; for the sooner they are landed, the sooner the risk of the underwriters determines. If the body of underwriters were bound to elect whether these

* large Russian ships should be unloaded by means of these [* 436] lighters employed by the persons interested in the goods on board, or whether the unloading should be left to the sole management of a foreign captain, who probably knows very little

about the nature of public or private lighters, and who must necessarily be much longer about it, I think they would not hesitate to choose the former method as most safe. With respect to the case of *Sparrow v. Carruthers*, Mr. Justice BULLER has expressly taken the distinction between public and private lighters, which differs that case from the present.

CHAMBRE, J.—This is a case of considerable consequence in respect of the sum which depends upon it, but of still more in respect of the general question which it involves; and if I entertained any doubts upon the subject, I should wish to take time before I delivered an opinion; but having none, I think the sooner we come to a decision the better. The argument for the underwriters rests entirely on the case of *Sparrow v. Carruthers*. I do not wish to shake the authority of that case, nor indeed is it necessary so to do; but I cannot but observe that if the decision had been otherwise I should have been better satisfied. The case before Mr. Justice BULLER has more weight with me; and particularly so, because the parties acquiesced in his determination, notwithstanding they would have been armed with the authority of *Sparrow v. Carruthers* had they been inclined to bring the case before the Court. The only strong ground upon which the case of *Sparrow v. Carruthers* can be supported (if indeed it can be supported at all) is, that the owner of the goods completely accepted them, and discharged the ship-owner from any further concern in them. In this case I rely on the words of the policy and the known and settled usage of trade. What can the words “until safely landed” refer to? It is admitted that it is impossible for these large vessels to come up to the wharves in order to deliver their goods; that the merchants have no lighters of their own, and that the ships’ boats are inadequate to the purpose. In all cases, therefore, the goods must be delivered by the public lighters, and we must take the underwriters to be cognisant of the usage of the trade which they insure. I do not lay much stress on the notion of these lightermen being public officers. There are many trades which are under certain regulations, such as porters, carmen, and hackney coachmen, and yet they are not [* 437] public officers; *but I rely on the constant usage of trade, and on the words of the policy.

PER CURIAM,

Postea to the plaintiffs.

Strong v. Natally.

1 Bos. & P. (N. R.) 16-20 (8 R. R. 741).

Insurance. — Goods. — Until discharged and safely landed.

Action on a policy on goods “until the cargo should be discharged and [16] safely landed.” On the arrival of the ship the goods insured were put on board a lighter hired in the usual way, and brought to the plaintiff’s wharf in the evening, but not landed, on account of the rough weather; the plaintiff then undertook to see to the landing himself, but in the night the lighter was, by an unavoidable accident, sunk, and the goods lost. *Held*, that the underwriters were discharged.

This was an action on a policy of insurance on a cargo of fish from Shetland to London. The policy * was in the [*17] usual form, “until the cargo should be discharged and safely landed.” The cause was tried before Lord ALVANLEY, Ch. J., at the Guildhall sittings after last Hilary Term, when the jury found a verdict for the defendant under the following circumstances: On the arrival of the ship the goods insured were put on board a lighter hired in the usual way, and brought to a wharf belonging to the plaintiff in the afternoon, but in consequence of the roughness of the weather could not be landed that evening. The lighterman, finding that he could not land the goods, asked the plaintiff whether he should stay to see the cargo landed. The plaintiff said that he need not do so, for that he (the plaintiff) would look to the landing himself. Accordingly the lighterman left the cargo alongside the wharf. In the course of the night the lighter was sunk, without any neglect being imputable to any one; and a watchman in the employment of the plaintiff, having discovered the circumstance, immediately gave an alarm.

A rule having been obtained on a former day, calling on the defendant to show cause why the verdict should not be set aside and a new trial had,

Shepherd, Serjt., now showed cause, and insisted that the liability of the defendant was put an end to by the conduct of the plaintiff in taking the goods under his own care; that if such a delivery were not sufficient to discharge the underwriters, nothing short of the goods being actually warehoused would relieve them from their undertaking. He admitted the authority of *Hurry v. The Royal Exchange Assurance Company*, 2 Bos. & Pul. 430 [p.

620, *ante*], but insisted that this case was distinguishable from that, since there the only question was, whether the insurer was liable for the risk attending the carriage of the goods from ship to shore in a public lighter; whereas here, admitting the underwriter to be subject to such liability, the goods were [* 18] received by the plaintiff *into his own custody, insomuch that the lighterman was prevented by him from taking that care of them which he would otherwise have done.

Best, Serjt., *contra*, observed that the only question was, whether the voyage was at an end; for if not, the loss had happened by one of the perils insured against; that in *Hurry v. The Royal Exchange Assurance Company* the authority of *Sparrow v. Carruthers*, 2 Str. 1236, had been considerably shaken, in which latter case it had been holden that a party by taking goods into his own lighter discharged the underwriters; that the conduct of the plaintiff in this case could not amount to more than making the lighter his own; that it was of no consequence whether the goods during the night remained in the custody of the lighterman or of the plaintiff, since neither of them could have prevented the accident which happened; that the goods therefore being lost in the course of their conveyance from the ship to the shore, the underwriter, according to the authority of *Hurry v. The Royal Exchange Assurance Company*, was liable to answer for the loss.

Sir JAMES MANSFIELD, Ch. J. — This case depends upon a very short point; namely, whether the owner of the cargo, under the particular circumstances of this case, did not take the cargo into his own care and possession? It seems to me that he did. The goods were brought in the lighter to the plaintiff's wharf, and if nothing had happened to relieve the lighterman from that duty, he would have been bound to set some person to watch over the goods until they should be landed. But the owner of the goods in this case dispensed with the obligation of the lighterman to take charge of them during the night, and took them into his own custody; and while they were in his custody they were lost. [* 19] Can it be contended then that by such conduct the *plaintiff did not discharge the lighterman? If he did discharge the lighterman, he placed himself in the same situation as if the goods had been actually landed and delivered. It is argued that it does not appear that any care would have prevented the accident which happened; as to which I will only observe that neither

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does it appear that the accident might not have been prevented by extraordinary diligence. It appears to me that this case is not distinguishable from that of *Sparrow v. Carruthers*. There the owner of the goods chose to employ his own private lighter to land them, and by that act he was holden to have discharged the underwriter. The plaintiff in this case chose to take the goods into his own possession before they were landed, and having so done he might have kept them in the lighter for a week ; for he had as much control over them as if they had been in his custody for that period. I think the verdict, therefore, perfectly right.

HEATH, J. — I am of the same opinion. The plaintiff in this case relies on the words in the policy, “until they are safely landed.” But every party may renounce so much of a contract as is for his own benefit. Now in this case the plaintiff, by his conduct, has renounced all the benefit which would have accrued to him from the words of the policy on which he relies. It matters not how the loss happened after the plaintiff had released the underwriters from that provision in the policy under which they would otherwise have been liable.

ROOKE, J. — I am of the same opinion, and I should not add anything to what has already been observed by my LORD CHIEF JUSTICE and my Brother, with whom I entirely agree, if it had not been supposed by Mr. Park in the last edition of his book, p. 22, that this Court, in the case of *Hurry v. The Royal Exchange Assurance Company*, had denied the authority of *Sparrow v. Carruthers* ; * whereas we certainly did not intend to [*20] shake the authority of that case, but only to decide the case then before the Court upon its own circumstances.

Rule discharged.

ENGLISH NOTES.

An insurance on a maritime adventure is *primâ facie* not to be extended to risks on shore. So where a policy on ship and cargo stated the adventure on cargo to “begin from the loading thereof aboard the said ship,” and to terminate “when the same shall be safely landed, . . . with liberty to load, reload, exchange, sell, or barter all or either goods or property on the coast of Africa and African islands . . . without being deemed a deviation,” — it was held that this did not protect goods lying at the factory of the insured after they were landed, or any goods destined to be the cargo of the ship. *Harrison v. Ellis* (1857), 7 El. & Bl. 465, 26 L. J. Q. B. 239. But where it was the usage

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of the trade that furniture of the ship should be stored on shore at a certain stage of the voyage, the furniture so stored still remained covered by the policy on ship. *Pelly v. Royal Exchange Assurance Co.*, 1 Burr. 341, and 14 R. C., p. 30.

The policy in the form considered in the principal cases continues to cover the risk in any kind of craft which are usually employed for landing goods at the place of discharge. *Stewart v. Bell* (1821), 5 B. & Ald. 238, 24 R. R. 342. And the merchant insured does not warrant that the lighters or other vessels so employed (not being his own) should be seaworthy. *Lane v. Nixon* (1866), L. R. 1 C. P. 412, 35 L. J. C. P. 243, 12 Jur. (N. S.) 392, 14 W. R. 641.

AMERICAN NOTES.

These cases are cited by Parsons (2 Marine Insurance, p. 62).

In *Wadsworth v. Pacific Ins. Co.*, 4 Wendell (N. Y.), 33, it was held that where it was the custom, when a vessel was detained at quarantine, to send the cargo by lighters to a depot on shore, and to lade them on deck in the transshipment, the insurer could not object to a recovery.

In *Osacar v. Louisiana S. Ins. Co.*, 8 Martin (Louisiana), 574, the vessel arrived in the roadstead of Soto La Marina, in Mexico, and anchored outside the bar in the usual place twenty leagues from the town, and began to discharge cargo in lighters, according to the usage. After part had been landed, the vessel was driven away by a tempest and never heard from again. A recovery was allowed for all the cargo not landed from the lighters. But the Court said that if the goods had been landed on the beach and transported to the town on the backs of mules, this would have been a land risk for which the insurer would not have been liable. To precisely the same effect, *Mobile M. D. & M. Ins. Co. v. McMillan*, 27 Alabama, 86.

No. 42. — *Shawe v. Felton*, 2 East, 109. — Rule.

No. 42. — SHAWE *v.* FELTON.

(K. B. 1801.)

No. 43. — HORNEYER *v.* LUSHINGTON.

(1811, 1812.)

No. 44. — SAMUEL *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

(1828.)

RULE.

IN a policy on ship for a voyage and until “moored twenty-four hours in good safety,” the risk is not treated as at an end if, when she arrives, she has received her death wound by a peril of the sea, nor unless she has been moored so as to have the opportunity of discharging; nor if during the twenty-four hours she is seized or proceedings initiated (for a cause insured against) under which a loss eventually takes place.

Shawe v. Felton.

2 East, 109-117 (6 R. R. 394).

Insurance. — Ship. — Duration of Risk. — Moored in Safety.

On an insurance on ship and goods valued at so much, at and from [109] Liverpool to Africa and the West Indies, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sunk: *held*, that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market.

This was an action on a policy of insurance on the ship *Indian*, and goods, valued at £6600, on a voyage at and from Liverpool to the coast of Africa, during her stay and trade there, and from thence to

her port or ports of discharge, sale, and final destination in the West Indies and America, and until she was moored twenty-four hours in safety. At the trial before Lord KENYON, Ch. J., at the last sittings at Guildhall, it was proved that the ship was seaworthy when she sailed from Liverpool; and it was not disputed that the insurers were interested in the ship and outfit (including provisions and sea-stores laid in for the slaves which were [* 110] to be taken in on the coast of Africa, and also * wages advanced to the crew), to the extent of the value insured. The ship arrived on the coast of Africa, took in a cargo of slaves there, and proceeded to Demerara. In the course of her voyage thither, and in calm weather, she met with a violent concussion, described to resemble an earthquake, from which she received so much damage, that it was with the greatest difficulty she was kept afloat by pumping until she reached Demerara, almost a wreck, where she was obliged to be lashed alongside of a hulk, to keep her from sinking; and in attempting to remove her from thence to the shore, a few days afterwards, she sunk, although the distance was only about fifty yards. At the time of her arrival at Demerara her stores were considerably expended. The ship was originally destined there, in the first instance, with directions to the captain to proceed to other ports and places in case he could not dispose of the slaves there at a certain average price. And his letter of instructions from his owners contained the following direction: "As your vessel is not according to the late Act of Parliament,¹ we would have you sell her in the West Indies, provided you can procure £1200, but expect you will get from £1500 to £1200. Should you not dispose of her, you will procure what freight you can for Liverpool." In fact, the vessel having been surveyed at Demerara, and condemned as unserviceable, was sold only for £388. In consequence of this the captain was obliged to dispose of all the slaves there, not indeed so advantageously as he might otherwise have done, had he been enabled to proceed to other places, but still so as to cover [* 111] the average * price to which he was limited by his instructions. The plaintiff gave notice of abandonment to the underwriters, and recovered as for a total loss on the ship; and

¹ This was one of the several Acts which passed for the regulation of the African slave trade, limiting the number of slaves to the tonnage, and requiring the

vessels to be of a certain build. The Act alluded to was to take place after the voyage in question commenced.

the verdict was taken for the full amount of the sum insured, it being a valued policy.

A rule was obtained, calling on the plaintiff to show cause why the verdict should not be set aside and a new trial had, on the grounds that the subject-matter of the insurance was so much reduced from the original value at the time of the loss (if it were to be considered as a total loss), that the sum valued in the policy ought not to conclude the underwriter. That a policy, though valued, was still no more than a contract of indemnity, and was only meant to bind the parties when the subject-matter continued nearly in the same state as at first, allowing for usual wear and tear. That in particular it ought not to conclude in this case; because not only the actual worth of the ship was by the owner's own confession of so much less than the stipulated value, but also the stores which were included in the insurance were profitably expended by him in the purchase and sustenance of the slaves, all of whom had been brought to an advantageous market; and therefore, so far from the plaintiff having incurred any loss in this respect for which he was entitled to an indemnity, he was in fact a considerable gainer by the adventure.

The Attorney-General, Erskine, Park, and Wood, showed cause against the rule. It was first attempted at the trial to show that the ship was not seaworthy when she sailed; but that failing, it was next insisted that there was not a total loss, inasmuch as the ship was moored above twenty-four * hours at [* 112] Demerara before she sunk; but that also failed: for taking Demerara to be in the event her ultimate port of discharge, which only became so because the vessel was not in a condition to proceed farther and take the chance of a better market, still it appeared that she was not moored in safety for a moment, but came into the port a wreck, with her death's wound which she received at sea. Now, it is insisted that the policy, though valued, must be opened under the circumstances. But this is contrary to the whole course of proceeding with respect to valued policies. It is not pretended that the property insured was overvalued in the first instance, but that by wear and tear and the consumption of provisions and ship's stores, which were covered by the policy, the value had been reduced. If this were admitted, it would take away all certainty, not only from valued, but from open policies; for every day's continuance of the voyage must

reduce the value in these respects. It happens, indeed, in the present instance, that the object of the voyage was not defeated, because the slaves were preserved; but this is an insurance on the ship and stores, and the same objection would have applied if the ship had sunk at sea, near to the same port, and all on board had perished. It might still have been said, that at the time the loss actually happened, there was the same diminution in the actual value of the property insured. Besides, the lowest sum for which the ship was directed to be sold is no criterion of the value; for the owner could no longer make use of her for the purpose for which she was originally built, and therefore it was more advantageous to him to dispose of her at once, even at a loss. At any rate, this being a valued policy for which the underwriter receives an adequate premium, he is concluded from an [* 113] examination *into the value at any subsequent period of the voyage, no fraud being imputed to the plaintiff in the first instance. The custom of making valued policies arose soon after the Stat. 19 Geo. II., c. 37.¹ Magens (Mag. 1 vol. 35) on Insurance, which was first published here in 1755. nine years after the statute, treats it as a settled custom. In *Le Cras v. Hughes*, E., 22 Geo. III., *vide* s. c. Parke on Insur., Lord MANSFIELD said: "The constant usage since the Stat. 19 Geo. II., in case of a total loss, has been to let the valuation stand, and the parties are estopped from altering it; but an average loss opens the policy. I will give you the origin of this custom: it was in a case of *Erasmus v. Banks*, Mich., 21 Geo. II., where Lord Ch. J. LEE said: "Valuation at the sum insured is an estoppel in case of a total loss, but not so in case of an average loss only. On the 13th December, 1747, the same point came again before the Court in *Smith v. Flexney*, and was so determined." Lord MANSFIELD then proceeded to observe that it was a reasonable usage, and ought to be the rule.

Gibbs and Cassels, in support of the rule, admitted that a valued policy was not to be opened unless there were fraud where the thing valued was the thing lost; but they contended that here the subject-matter of the valuation was not the subject of the loss. Admitting that the vessel with her outfit was worth £6600 when the insurance was made, yet as a great proportion of that value,

¹ This was to prohibit wagering policies, "interest or no interest, or without further proof of interest than the policy."

to the amount of above £3000, consisted in those stores and provisions, out of which the profit of the voyage was to arise by the expenditure of them, and as in fact the slaves who were purchased and sustained out of that expenditure *all [* 114] arrived safe and produced the profit of the voyage, the subject-matter of the insurance, as to so much, was not lost to the plaintiff, but arrived at the place of its destination, and has been received by him in the shape of profit upon the voyage. The same observation would apply to another sum of about £400 paid in advance of the seamen's wages at Liverpool. At any rate, there is no instance in the books of a total loss, where the object of the voyage was accomplished, and the subject-matter of the insurance arrived in specie at the place of destination. It is, therefore, an attempt to call upon the underwriters for an indemnity to the amount of £6600, when upon the plaintiff's own showing, he has not been damnified to a sixth of the amount; and is nothing less than a wagering policy, within the prohibition of the statute.

Lord KENYON, Ch. J. — The jury had no doubt but that the ship was seaworthy when she sailed, and that there was a total loss; for though she arrived at Demerara, she was never moored twenty-four hours, nor a moment, in safety. She came there a perfect wreck, having received her death's wound at sea, and was with the utmost difficulty kept afloat till all the people on board were landed. It is not pretended now that there was any fraud in the case; but it is contended that the underwriter is not bound by the valuation in the policy. It is of little consequence to inquire what my opinion would have been upon the subject of valued policies in the year 1746, immediately after the Stat. of the 19 Geo. II. passed; for very soon after they were decided to be legal by as cautious and upright and painstaking a Judge as ever presided in this Court (Lord Ch. J. LEE). He was succeeded *by Sir DUDLEY RYDER, and this latter by Lord [* 115] MANSFIELD; and during all this period such policies have been sanctioned by one uniform course of decisions. All this is now supposed to be wrong, and the rules by which this and other commercial nations have so long regulated their dealings are now wished to be disturbed; but I will not lend my aid to open such a new and wide door of litigation, much exceeding everything that has gone before. If we were to enter into the

calculations which have been contended for, every valued policy would be to be opened. Every man's meal on board a ship would take from the value of the original outfit. Is this to be endured? Will good faith admit of it? Where is the line to be drawn between a greater or less diminution of the value? Therefore as the rule and practice of valued policies have been acted upon and sanctioned since the passing of the statute, I am not one who wish *quieta movere*.

GROSE, J. — We are desired by this motion to open a valued policy, contrary to the practice, and in a case where no fraud is imputed; for doing which no authority has been cited. If we were to admit it in this instance, it would be required in every other; and thus a door would be opened to endless litigation. Therefore to avoid great injustice to individuals, and great public inconvenience, I think we are bound to refuse the application.

LAWRENCE, J. — As the practice of binding parties as to the amount of their interest by valued policies has obtained ever since the Stat. of Geo. II., it would require very strong reasons to show that it is wrong. That statute was passed in order to prohibit mere wagering policies by persons insuring who had no [* 116] interest in the thing insured, and therefore * it avoids policies made, interest or no interest, or without further proof of interest than the policy itself. The effect, therefore, of a valued policy is not to conclude the underwriter from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the *quantum* of the assured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject-matter of the insurance was not at first of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject-matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If on account of the peculiar nature of an African voyage there ought to be a difference in this respect between these and other trading adventures, the underwriters may, if they please, introduce a special clause in the policy to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustain-

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ing of the slaves. As it stands at present, there appears no ground for making any such distinction.

LE BLANC, J. — The present is an extreme case, because the loss happened at the last period of the voyage at which it could happen. But the same thing must occur more or less in every policy upon ship and outfit. The value of the property must be continually diminishing, and if the loss happen at the latter end of a long voyage, no doubt the property must be considerably deteriorated at the time by the usual wear and tear; and yet it is never objected that *the underwriter is not liable [* 117] for the original value. As to the owner himself having estimated the value of the property at so much less than the sum at which it was insured, many things may happen to render a vessel of less value when the voyage is concluded, although the subject-matter exists; the amount of the repairs required, &c. The rule having been so long laid down, as to valued policies, it is too late to open it again.

Rule discharged.

Horneyer v. Lushington.

15 East, 46-51 (s. c. 3 Camp. 85; 13 R. R. 759).

Insurance. — Duration of Risk. — Moored in Safety. — Seizure for Simulated Papers.

Where immediately upon the arrival of a ship at Riga, her papers were [46] taken and her hatches sealed down by the officers of government, and so kept till her papers were sent to St. Petersburg to be examined; and on such examination immediate orders were issued for the seizure of the ship and cargo, which were afterwards condemned for carrying simulated papers: *held*, that this was not a mooring twenty-four hours in safety after her arrival, within those words in the policy.

But that as the ship had no leave to carry simulated papers, although without such she would certainly have been seized and condemned, as coming from an enemy's country, the underwriters were not liable for the loss which ensued from the act of the assured himself. A policy of insurance on goods "at and from Gottenburgh to Riga, beginning the adventure on the goods from the loading thereof aboard the ship at Gottenburgh," will not cover goods previously loaded on board at London, which arrived on the ship at Gottenburgh.

Assumpsit on a policy of assurance, "lost or not lost, at and from Gottenburgh to Riga, or any ports in the Baltic, upon goods and ship *Amelia*, beginning the adventure upon the goods from the loading thereof aboard the said ship at Gottenburgh;" with a

memorandum declaring the insurance to be £3500 on the cargo and £1000 on the ship. The declaration, after setting forth the policy (which did not contain any liberty to carry simulated papers), averred that on the 13th of September, 1809, the ship was in good safety at Gottenburgh, and that the cargo in the policy and memorandum mentioned was of great value; and that afterwards the ship, with the cargo, set sail from Gottenburgh, and arrived at Riga, where with the cargo she was taken, arrested, restrained, and detained by the Emperor of Russia, and wholly lost.

The declaration also contained the usual money counts. At [* 47] the trial before Lord ELLENBOROUGH, *Ch. J., at the London sittings after last Trinity Term, it appeared that the goods insured were laden on board the ship in the port of London. She sailed with a license, and took on board simulated papers representing that she came from Berghen in Norway (Sweden being then at war with Russia). She arrived at Gottenburgh, from whence, after receiving orders, she proceeded to and arrived at Riga, where her papers were taken, and her hatches immediately sealed down by the government officers until her papers could be sent to St. Petersburg to be examined; and, on such examination, orders were immediately sent to Riga to seize the ship and cargo, which was done; and she was afterwards condemned with her cargo, on the ground of having simulated papers on board. This, Lord ELLENBOROUGH held, was not a mooring twenty-four hours in safety, there having been an incipient seizure immediately on her arrival, which ended in her condemnation. And the case of *Waples v. Eames*, 2 Stra. 1243, was cited, where Lord Ch. J. LEE had ruled that "moored twenty-four hours in good safety meant such a mooring as gave the ship the opportunity of unloading and discharging her cargo." At the same time the case of *Bell v. Bell*, 2 Camp. 475 (see p. 616, *supra*), was also mentioned. It was then objected, on the part of the defendant, that the policy containing no leave to carry simulated papers, and the ship notwithstanding having carried them, and been condemned on that very ground, the plaintiff could not recover for a loss of which he himself had been the efficient cause. To which it was answered that as the ship and cargo must necessarily have been [* 48] *confiscated if she had gone to Riga without simulated papers (Sweden being at war with Russia), the carrying of them was for the protection of the risk and for the benefit of the

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insurer, and therefore within the general scope of the policy, though not within the particular words of it; in like manner as hoisting the enemy's flag in sight of the enemy, in endeavouring to avoid capture, is no fraud upon the underwriters. It was contended, however, on the part of the plaintiff, that at all events he was entitled to a return of the premium in respect of the goods, the insurance being from the landing thereof at Gottenburgh; as it appeared that there were no goods laden at Gottenburgh, but only at London; the risk, therefore, as to the goods insured never attached. Lord ELLENBOROUGH, Ch. J., directed the jury to find a verdict for the defendant, reserving liberty to move to enter a verdict for the plaintiff on both the points, which the Attorney-General accordingly did in the last term; when the Court, after much discussion, refused a rule *nisi* upon the first point, and granted it on the latter point only, upon which the case of *Spitta v. Woodman*, 2 Taunt. 416 (p. 569, *ante*), was mentioned.

With respect to the first point, the Attorney-General argued that though the sentence of condemnation was conclusive as to the fact of the ship's having carried simulated papers, it did not show that it was unlawful for the Swedish owner to do so, as between him and the British underwriters. The latter knew at the time of subscribing the policy from Gottenburgh to Riga that there was war between Sweden and Russia; and yet they insured the risk generally, without any stipulation, relying on the assured's using all the ordinary precautions to avoid danger, and lessen the *risk, of which this of carrying simulated papers [*49] is one of the most notorious. And if the Swede, being his own insurer, would thus have endeavoured to deceive his enemy in order to protect his property, the British underwriters would have had occasion to complain if he had omitted the same precaution when the risk was cast upon them, there being no term in the policy against it.

Lord ELLENBOROUGH, Ch. J., then said, I do not pronounce whether the carrying of simulated papers was or was not an enhancement of the risk insured; but my opinion is founded on the effect of the sentence of condemnation, which has proceeded upon the mere personal act of the assured in carrying such papers, which it treats as a crime; and which act is thereby proved to have been the efficient cause of the loss, the very ground of the condemnation. How, then, can the underwriter be answerable for

a loss which happened from an act of the assured done without his leave? The other Judges concurred with his Lordship in this opinion.

Garrow and Campbell now showed cause on the other point. After a party has by his own act caused the loss of the goods, he cannot be permitted to demand a return of premium. But if that be no objection, here the policy being on the ship and goods, the premium in respect of the latter cannot be apportioned; and if it could, inasmuch as the ship with the goods on board was at Gottenburgh, that is a sufficient inception of the risk, and therefore the plaintiff is not entitled to any return. The case of

Hodgson v. Richardson, 1 W. Bl. 463 (p. 581, *supra*), [*50] will not govern the present; *for although that was an insurance at and from Genoa to Dublin, and it appeared that the cargo had been put on board at Leghorn, and not at Genoa, yet the underwriter was not held to be discharged on that ground, but on the ground of concealment of material circumstances respecting the probable condition of the cargo. Neither does the case of *Robertson v. French*, 4 East, 130 (7 R. R. 535), decide this question; the Court having there only determined that a cargo laden at the Cape of Good Hope, before the ship's arrival "on the coast of Brazil," was not a cargo loaded on board "on the coast of Brazil," within the words and meaning of the policy on the return voyage. *Spitta v. Woodman* (p. 569, *supra*) in C. B. is certainly a decision against the defendant; but it has not been considered as conclusive, for the point has been again reserved in *Langhorne v. Hardy*, at the last sitting before the Chief Justice of that Court.

The Attorney-General, *contra*. — The policy never attached on the goods, and therefore the plaintiff is entitled to a return of premium. *Spitta v. Woodman* has expressly decided the point. It was, like the present, an insurance on goods at and from Gottenburgh, beginning the adventure from the loading thereof on board, without saying where; and it also appeared that when the policy was effected, the underwriter knew that the goods were laden at London, and not at Gottenburgh; so that it was a much stronger case than the present to charge the underwriter with the risk, if by law it could have been done. But the Court notwithstanding thought they could only look to the written contract between the parties.

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* Lord ELLENBOROUGH, Ch. J. — When this question was [* 51] first agitated, I had a difficulty in putting the construction, which is now contended for, on words which I really believe bore a different construction in the commercial understanding of those who used them. However, the Court came to a decision on the point in the case of *Robertson v. French*; and this question now comes before us after the case of *Spitta v. Woodman*. It is therefore no longer to be doubted what construction is to be put upon these words. It is to be considered also in aid of such construction that the goods may have been damaged in their transit from London to Gottenburgh, which might cast upon the underwriter a damage occurring anterior to the commencement of the risk. It seems to me, therefore, that under the terms of this policy the risk upon the goods never commenced, and there must be therefore a proportional return of the premium.

GROSE, J., concurred.

LE BLANC, J. — A different construction would at all events make the risk commence on the arrival of the ship at Gottenburgh, instead of from the loading of the goods there, which is the time specified in the policy.

BAYLEY, J. — In *De Symonds v. Sheddon*, 2 Bos. & P. 153, the Court of Common Pleas seem to have entertained the same opinion.

Rule absolute.

Samuel v. Royal Exchange Assurance Company.

8 Barn. & Cress. 119-124.

Insurance. — Ship, Freight, and Goods. — Duration of Risk.

A vessel insured from Sierra Leone to London, and upon which the [119] insurance was to endure until she had been moored in good safety twenty-four hours, arrived in the evening of the 18th of February, and the captain, having orders to take her into the King's Dock at Deptford, moored her near the dock gates. On the following morning he was informed at the dock that no order for his admittance had been received, but that if it had, the vessel could not be then admitted, on account of the quantity of ice in the river. The order was sent by the Navy Board on the 21st, but on account of the ice the ship could not be moved until the 27th, and then in warping her towards the dock a rope broke, she grounded, and was totally lost. The jury found that the vessel remained at her moorings from the 18th to the 27th of February on account of the ice, and not for want of an order to enter the dock. *Held*, that, upon this finding, the plaintiff was entitled to recover, for that the place where the vessel was moored not being the place of her ultimate destination, the

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policy did not expire when she had been there in safety twenty-four hours; and as the vessel remained at those moorings on account of the ice, and not waiting for the order, the underwriters were not discharged by the delay.

Covenant on a policy of assurance at and from Sierra Leone to London, "on ship, called *Salmon River*, and freight, to begin at Sierra Leone, and endure upon the ship until she shall have arrived at London and hath there moored at anchor twenty-four hours in good safety, and upon the goods until the same be there discharged and safely landed." Averment, that whilst the vessel was proceeding on her voyage, and before she had been moored at London twenty-four hours, she grounded, and was wrecked and totally lost. Second count for a loss by barratry of the master.

Plea, the general issue, according to the statute, that the [* 120] corporation * have not broken their covenants, or any of them. At the trial before Lord TENTERDEN, Ch. J., at the London sittings after Trinity Term, 1827, it appeared that the *Salmon River* sailed from Sierra Leone for the port of London on the 3rd of December, 1826, laden with teak, and chartered to one Lennox, who had entered into a contract with the Navy Board to supply them with a cargo of teak to arrive before the end of that month. On the 2nd of February, 1827, the vessel having received damage in a gale of wind, the captain put into Dover, and remained there under repair until the 13th of February. During that interval he came to London for orders, and Lennox directed him to take the ship into the King's Dock, at Deptford, and deliver her cargo there. In the afternoon of Sunday the 18th of February the vessel arrived at Deptford, and was moored alongside a King's ship, near the dock gates. On the following morning the captain made inquiries at the dock-yard respecting the admission of his ship, and was informed that no bills of lading had arrived, and there were no orders to admit her; but that she could not under any circumstances be then admitted on account of the quantity of ice in the river. The captain then went to London, and after some negotiation with Lennox, the Navy Board consented to take the cargo, which they at first refused to do, because it arrived out of time, and on the 21st of February the chief officer of the dock received orders to admit the vessel. From the 18th until the 25th of February the quantity of ice in the river continually increased, but on that day the frost gave

No. 44. — *Samuel v. Royal Exchange Assurance Co.*, 8 Barn. & Cress. 120-122.

way, and on the 27th the *Salmon River* was cast off from her moorings and warped towards the dock. In consequence of a rope breaking, she went ashore near the *dock gates, [* 121] and was totally lost. It appeared also that many vessels laden with timber discharged their cargoes at the place where the *Salmon River* had been moored. Upon this evidence, it was contended for the defendants, either that the place where the *Salmon River* was moored must be considered as the place of her destination, in which case she had been in good safety for twenty-four hours before the loss, or that if it were not, the captain had remained there an unreasonable time, and consequently the underwriters were discharged. The LORD CHIEF JUSTICE left it to the jury to say whether the *Salmon River* remained lashed to the King's ship waiting for an order to be admitted into the King's Dock, or whether she remained there because from the 18th to the 27th of February she could not have removed elsewhere for the purpose of delivering her cargo had the owner wished it, and directed them, if they thought she remained waiting for the order, to find for the defendants, otherwise for the plaintiff. The jury having found a verdict for the plaintiff, the Attorney-General, in Michaelmas Term, obtained a rule *nisi* for entering a nonsuit, against which

Campbell, Pollock, and Joshua Evans showed cause. — The real question in this case is, What was the destination of the vessel? She could not be considered as moored twenty-four hours in good safety, until she had been for that space of time moored at the place where her cargo was to be discharged. Suppose the captain, in consequence of adverse winds, had anchored at Gravesend, and remained there twenty-four hours, it is clear that the underwriters would not have been discharged, although Gravesend is in the port of London. The only *circumstance upon [* 122] which any argument can be raised is, that on Monday the 19th of February the order for admitting the *Salmon River* into the King's Dock had not arrived. If between the 18th and the 21st of February, when the order arrived, the river had been open, so that the ship might have proceeded on her voyage, the delay would have been unreasonable, and the underwriters discharged; but the jury have relieved the plaintiff from that difficulty, by finding that from the 18th to the 27th the state of the river was such that the vessel could not have been moved with safety.

Sir J. Scarlett and Bosanquet, Serjt., *contra*. — The plaintiff in this case ought to have been nonsuited on two grounds. First, the ship was moored in good safety twenty-four hours before the loss. Secondly, the delay at Deptford was unreasonable, and the policy thereby rendered void. Had the captain arrived in the river destined to any particular dock, the underwriter would have remained liable until the vessel could by reasonable diligence be placed in that dock in good safety. But here the vessel was not destined to any particular part of the port of London. No doubt the captain intended to take her into the King's Dock if he could; but that was quite uncertain, and so continued from the 18th to the 21st of February. During that time the underwriters could not remain liable. Again, if the captain did not come to an anchor at Deptford, in order to inquire whether he could go into the King's Dock, he should have proceeded at once to the place of his destination. It was not pretended that his course was impeded by ice on the 18th, and as he then chose to anchor [* 123] at Deptford, that being a place where timber *vessels frequently discharge their cargoes, it must be considered as the place of his destination, and then the vessel had been moored in good safety twenty-four hours before the loss.

Lord TENTERDEN, Ch. J. — Upon the whole, I am of opinion that this rule ought to be discharged. It has been contended that His Majesty's dock at Deptford cannot be considered as the place of destination of the *Salmon River*. But upon the evidence, I think it was the place of her destination. The master was ordered to take her there, and he came up the river intending to go there. It is true that at that time he had no right to enter the dock, and it was quite uncertain whether permission to do so would be granted or not. He arrived in the evening of Sunday the 18th of February; of course he could not then go into the dock, and on the Monday he found that no orders for his admission had been received; and if at that time the vessel could have gone in, her detention at the moorings would have been improper, and the underwriters thereby discharged. That question of fact I left to the jury, and they found that the vessel did not remain at Deptford for want of an order to enter the dock, but because she could not be safely moved to any other part of the river. Another point made was, that the place where the vessel was moored must be considered as her place of discharge, because

some vessels do in fact discharge their cargoes there. But it was manifest that there never was an intention to discharge her cargo there, the orders to the master being to take her into the King's Dock. That ground of defence therefore fails; and as the delay would only be improper if the vessel could have gone to some * other place of discharge in the river, I think that [* 124] the plaintiff is entitled to retain the verdict found in his favour.

HOLROYD, J.¹ — It seems to me that the question is concluded by the finding of the jury, that the state of the river prevented the removal of the ship from the 18th to the 27th of February. Under such circumstances, there could be no improper delay, and there is no ground for considering the place where she was lying as the place of her ultimate destination.

LITTLEDALE, J., concurred.

Rule discharged.

ENGLISH NOTES.

A ship was insured for a voyage, and until moored twenty-four hours in safety, against the usual perils, including barratry of the master. After the ship had been in port for more than twenty-four hours, she was seized for an act of smuggling committed by the master during the voyage. It was held that the risk had been determined, and the underwriters were not liable. WILLES, J., in delivering the unanimous judgment of the Court, said: "There must be some certain and reasonable limitation in point of time laid down by the Court when the insurer shall be released from his engagement. If he be liable for a month, he may be for a year, and so on. And we all think that the law on insurances would be left unsettled and in much confusion if any other time were suggested than that prescribed by the policy; namely, the continuance of the voyage, and the ship's being moored twenty-four hours in safety." *Lockyer v. Offley* (1786), 1 T. R. 252, 1 R. R. 194.

Where an insurance was made on ship at and from St. Vincent and all or any of the West India islands to her port of discharge and loading in the United Kingdom, during her stay there, and thence back to Barbadoes and all or any of the West India colonies until the ship should have arrived at the final port of discharge, as aforesaid. The ship discharged all the cargo, except some coals and bricks at Barbadoes, and was proceeding elsewhere for a fresh cargo. It was made a question on the evidence whether the coals and bricks were retained for the mere purpose of ballast. The jury having found that the cargo was substantially discharged, and given a verdict for the defendant, the

¹ BAYLEY, J., had gone to Chambers.

Court refused to disturb the verdict. *Moore v. Taylor* (1834), 1 Ad. & El. 25.

An insurance was effected on ship "at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety." The ship had been chartered to proceed with cargo from Quebec to Wallasey Pool in the River Mersey, or as near thereto as she could safely get, and there discharge her cargo. She arrived in the Mersey and anchored abreast of Wallasey Pool, being unable from her draught of water to enter the pool. The master commenced discharging the cargo, intending when the vessel was sufficiently lightened to enter the pool. Some days after commencing to discharge, but before entering the pool, the vessel fell over and sustained injury. It was held that the vessel had arrived at her port of discharge, and had been moored twenty-four hours in safety, and that the underwriters were not liable. *Whitwell v. Harrison* (1848), 2 Ex. 127, 18 L. J. Ex. 465.

A ship insured to the Mauritius and for thirty days "after arrival," arrived at the Bell Buoy, a place at the entrance to the harbour of St. Louis in the Mauritius, and anchored there. Fourteen days afterwards the vessel was driven from her anchorage in bad weather, and lost. It was proved that it was usual for vessels seeking freight — as this vessel was — to anchor at the Bell Buoy; but there was conflicting evidence as to whether this anchorage was part of the harbour. It was contended that the ship had not arrived at the Mauritius, and that the anchoring at the Bell Buoy was unreasonable delay and a deviation. At the trial, BYLES, J., left it to the jury whether Bell Buoy was part of the harbour, at the same time telling them that, if it was a matter of law, he thought it was so, and therefore that a ship arrived there had arrived at the Mauritius. Next he left it to them whether, if the buoy was not part of the harbour, the delay was unreasonable. The jury found for the plaintiff. The Court refused to disturb the verdict. POLLOCK, C. B., said: "Whether a vessel has arrived at the place where the voyage is to end is a pure question of fact. The jury had found here that the vessel had so arrived, and I think they were justified in so finding." BRAMWELL, B., said: "There are two questions, it may be said, — one of law, the other of fact. The question of fact is, What is the Mauritius? It was argued that there cannot be two arrivals in the Mauritius; and that, as it is admitted that some vessels on some voyages would not be said to have reached the harbour until they had reached the *inner* harbour, that must be the principle for all purposes. But that, I think, is a fallacious way of putting the case. 'Arrival' means the vessel's reaching that place where, if she moved afterwards, she was only moving from one

part of the harbour to another. The jury have found, I think rightly, that the vessel had arrived in that sense." *Lindsay v. Janson* (1859), 4 H. & N. 699, 28 L. J. Ex. 315.

In contrast with the principal case of *Shawe v. Felton* may be mentioned *Lidgett v. Secretan* (1870), L. R. 5 C. P. 190, 39 L. J. C. P. 196, 22 L. T. 272, 18 W. R. 692. A ship was insured at and from "London to Calcutta and for thirty days after arrival," the words above quoted being in writing. The policy contained the usual printed words, — "upon the said ship, &c., until she hath been moored at anchor twenty-four hours in good safety." The ship arrived in a leaky condition, and having the steering gear much damaged. After being moored in the river, although the risk which always existed from the strong currents was much enhanced by the condition of the ship and the damage to the steering gear, she remained in actual safety for more than thirty days after the lapse of the twenty-four hours. Subsequently on being taken into dock for repairs she was totally destroyed by fire. It was held that since the vessel had remained in actual safety as a ship — and not a mere wreck — for the period stipulated, the risk determined at the end of that period; and the underwriters were liable only for the partial damage sustained up to that time, and not for the total loss which happened afterwards.

Under a policy on hull of ship "at and from Sydney to Newcastle (N. S. W.), while there, and thence to any port or ports, place or places, on the west coast of South America, and for islands adjacent, in any order, once or oftener, while there, and thence to any port or ports of call, and for discharge in the United Kingdom, and for Continent of Europe between Bordeaux and Hamburg, both included, and for thirty days in port after final arrival, however employed," — it was held that the policy covered risks at ports of loading as well as ports of discharge on the West Coast of Africa, and was not limited to risks at the port of final discharge of the cargo from Newcastle, and thirty days after. *Crocker v. Sturge* (1896), 1897, 1 Q. B. 330, 66 L. J. Q. B. 142, 75 L. T. 549, 45 W. R. 271.

AMERICAN NOTES.

Shawe v. Felton is cited in 2 Parsons on Marine Insurance, pp. 61, 91; and in *Davy v. Hallett*, 3 Caines (N. Y.), 16; 2 Am. Dec. 241; *Samuel v. Royal E.c. Assur. Co.*, in Parsons, pp. 59, 90; *Horneyer v. Lushington*, in *ibid.*, p. 61.

The topic was learnedly discussed in *Meigs v. Mutual M. Ins. Co.*, 2 Cushing (Mass.), 439, where a vessel was insured for a whaling voyage and till her return to Mattapoissett; on her return, after coming into that harbor, being unable on account of insufficient depth of water to reach the wharf where she was to discharge, she anchored at some distance, in the usual anchorage, and began to lighten in order to go up to the wharf, and while thus engaged was

Nos. 42-44. — *Shawe v. Felton*; *Horneyer v. Lushington, &c.* — Notes.

destroyed by fire. *Held*, that the insurance continued. The Court, citing the *Samuel* case, observed: "The vessel is insured and protected by the policy during the voyage, and till she has arrived. But when is the voyage ended, and when has she arrived? It is not usual to specify any particular wharf or spot in the destined port at which the voyage shall be ended. It would be impracticable to do so, as it could not be foreseen at what precise place it would be desirable to unlade; nor would it be known at what particular place a suitable berth for the ship could be obtained. It is usual therefore in policies to designate generally the port at which the voyage is to end. But the general term 'port or harbor' embraces a large extent, varying, of course, in different harbors, many miles of navigation, and generally the most difficult and dangerous navigation. It surely cannot be the intention of parties that a ship shall not be insured by the policy while she is passing through the perils of harbor navigation, occupying of course various periods of time, as winds and tides and other things may be favorable or unfavorable. Reaching the harbor therefore cannot be arriving within the meaning of the policy; and if it do not mean that, it must mean that particular place or point in the harbor which is the ultimate destination of the ship. Until that point is reached, the voyage is not ended and the ship has not arrived; though she may be obstructed and delayed in her progress through the harbor, and for want of water, or by adverse winds or other causes, be obliged to come to anchor and remain at anchor twenty-four hours, and to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination, and of complete and final unloading, and until she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy.

"This is very clearly the meaning and effect of the contract of the parties as contained in the policy. This view of the case is very fully supported by authorities. In *Taber v. Nye*, 12 Pick. 105, this Court say: 'It is perfectly clear that by the returning to New Bedford the parties meant to her destined place of mooring there, and not merely to the waters or territory within the limits of the town or port of New Bedford.'

In *Dickey v. United Ins. Co.*, 11 Johnson (N. Y.), 358, the Court said: "It appears that the port of Havanna consists of an *outer harbor* or quarantine ground, near the *Moro Castle*, used for the purpose of visit and search, and for the landing of slaves, which is an exposed and dangerous station; and of an *inner harbor* at the city, where vessels having cargoes other than slaves usually anchor and discharge, after having been visited at the castle; and which *inner harbor* is a place of safety. In this case, the vessel arrived at the outer harbor, moored at the usual place for being visited, and for landing that part of her cargo which consisted of slaves, and without any unreasonable delay, in that dangerous situation, was wrecked by storm before she could have proceeded to the place of safety in the inner harbor without violating the laws of the port. As it regards the vessel and that part of the cargo insured by these policies, I am of opinion that the voyage insured was to end at the *inner harbor*; and of course that the *Minerva* was not moored twenty-four hours in good safety, at that port, or the usual place for unloading

cargoes. (2 Str. 1244.) The peculiar hazard and exposure of the outer harbor, during the necessary detention there, must be considered one of the principal perils insured against; for in no part of the voyage, probably, was the vessel exposed to equal danger. The underwriters were expressly informed by the assured before they signed the policy, that the schooner would have on board some negroes bound for the Havanna. They must be presumed to know the usages of the destined port, and every other fact material in calculating such a risk."

In *King v. Middletown Ins. Co.*, 1 Connecticut, 184, "a ship was insured from New London to Wilmington in North Carolina, thence to one or two ports in Ireland or England, with liberty to go to Lisbon, and to touch and trade at St. Ubes, and back to her port of discharge in the United States. The ship having performed her outward voyage, took in a cargo of salt at St. Ubes, cleared out therefrom for New York, arrived off Montaug Point, sailed thence for New York, and arrived there on the 21st of June, in the evening. The supercargo wrote the same evening to the owner in Hartford, advising him of the arrival of the ship, and received an answer on the 25th, directing him to proceed immediately with the ship and cargo to Middletown; the letter of the supercargo having been sent, and the answer returned, as soon as by the course of the mails was possible. On the 26th, the master, with the advice of the supercargo, took out of the ship about three thousand bushels of salt, and put it into lighters for the purpose of lightening the ship so that she could get into the Connecticut River. The ship and cargo were entered at the custom-house in New York, and the duty paid on three boxes of ~~lemons~~ being the only part of the cargo liable to pay duty; but no part of the ~~cargo~~ was taken out except the salt, which was put into lighters. The ship sailed from New York with the first fair wind, which was on the 30th, for Middletown; and in attempting to go through Hurl-gate on the first of July she was thrown upon the rocks, her rudder and a great part of her keel were knocked off, one of her sides was beaten in so that the whole of the salt on board was washed out, and she was in extreme danger of being utterly lost. While she thus lay on the rocks, viz. on the 4th of July, the owner abandoned her. The insurers refused to aid in getting her off, or in repairing her. She was got off on the 8th, and taken to New York, where she was afterwards sold at vendue." *Held*, that New York was not the port of discharge.

In *Simpson v. Pacific M. Ins. Co.*, 1 Holmes (U. S. Circ. Ct.), 136, it was held that a policy on a vessel for a voyage to a certain port and twenty-four hours after anchoring in safety was not terminated by her arrival, and lying at anchor in safety for more than twenty-four hours, at the anchorage-ground outside the harbor of the port, and according to the custom of vessels of her draught bound for that port, there discharging part of her cargo by lighters, in order to enable her to pass over a bar at the entrance of the harbor. Citing *Brown v. Tiernay*, 1 Taunt. 516; *Samuel v. Royal Ex. Ass. Co.*, ante: *Brereton v. Chapman*, 7 Bing. 559; *Whitwell v. Harrison*, 2 Exch. 127; *Meigs v. Mut. M. Ins. Co.*, supra: and distinguishing *Bramhall v. Sun Ins. Co.*, 104 Massachusetts, 510; 6 Am. Rep. 261, which last case held that "anchoring for the purpose of discharging cargo at a place to which a ship is destined for

No. 45. — Blackenhagen v. London Assurance Co., 1 Camp. 454. — Rule.

that purpose, and at which ships usually discharge cargo, is equally an arrival at a 'port of discharge,' although the place is not within any harbor," and distinguished *Samuel v. Royal Ex. Ass. Co.*, *Brereton v. Chapman*, and *Whitwell v. Harrison*; and so it was held there that an insurance "to a port of discharge in Spain" was terminated by anchoring in safety for twenty-four hours, although in an open roadstead, exposed on one side to winds and seas, and there discharging her cargo by lighters, according to the custom of vessels of her size and draught. The difference between the two cases was that in the *Simpson* case only part discharge at the anchorage was customary, and in the *Bramhall* case total discharge was customary at that place.

No. 45. — BLACKENHAGEN v. LONDON ASSURANCE COMPANY.

(1808.)

No. 46. — BROWN v. VIGNE.

(K. B. 1810.)

No. 47. — OLIVERSON v. BRIGHTMAN.

(Q. B. 1846.)

RULE.

If a ship insured for a voyage, abandons the voyage, although the abandonment has by force of circumstances become unavoidable, or if the further prosecution of the voyage has become illegal (*e.g.* by reason of a state of war with the government at the ultimate port of destination), the insurance is at an end. But if the further prosecution has only become highly dangerous or difficult, and the voyage is only suspended without a breach of the conditions of the policy and without abandoning the intention of prosecuting it, the insurance is not at an end.

Blackenhagen v. London Assurance Company.

1 Camp. 454-456 (10 R. R. 729).

Insurance. — Embargo. — Abandonment of Voyage. — Termination of Risk.

[454] If a ship with goods on board insured to a foreign port, learning in the course of her voyage that an embargo is there laid on all ships of her

No. 45. — *Blackenhagen v. London Assurance Co.*, 1 Camp. 454, 455.

nation, waits at some place as near thereto as she safely can till the embargo is removed, the goods will in the meantime be protected by the policy, while the voyage remains legal. But if she might, upon such an occasion, put into a friendly port adjoining to her port of destination, and instead of doing so she sails back for her port of outfit and is lost, she will be considered as having abandoned the voyage insured, and the underwriters will be discharged.

This was an action of covenant on a policy of insurance on goods in the ship *William*, at and from London to Reval. The loss was laid in one count to be by the perils of the sea; in another, by capture. Plea, *non infregit conventionem*.

The ship sailed from the Nore on the 15th October, 1807, under convoy of the *Forrester* sloop of war, for the Sound, and arrived there on the 27th of the same month. On the 15th of November she proceeded from thence towards Reval, under convoy of the *Garnet* sloop of war. Two days after, while they were proceeding on the voyage, the captain of the *Garnet* received information that an embargo was laid on all British ships in the ports of Russia. In consequence he ordered the *William* to put back, and on the 18th she returned to Copenhagen roads. She afterwards lay off Gottenburgh six days, and might have entered that friendly port if the master had thought fit. But on the 30th of November she sailed with the fleet for England, under convoy of the *Garnet* and the *Spitfire*, sloops of war.

The last time she was seen was on the 3rd of December, in a heavy gale of wind; and not having been *heard [*455] of since, it was allowed that she had certainly perished on her voyage home.

LORD ELLENBOROUGH. — This case will hardly bear to be stated. The underwriters were bound to indemnify the plaintiff for any loss that should happen on the voyage from London to Reval. If being unable to get to Reval, the ship had lingered in that quarter, or had necessarily returned with an intention of ultimately completing the original voyage, a question of some nicety might have arisen. But by sailing back for England in the manner she did, the original voyage was abandoned, and the underwriters were discharged. The master might deem this the most advisable course he could pursue for the benefit of those he represented; but were the underwriters still to be liable on the policy, if it had been convenient for him to carry the ship to the Straits of Magellan? The case which I remember coming nearest

No. 46. — *Brown and Irish v. Vigne*, 12 East, 283.

this was where a ship, being prevented by the ice from reaching her port of destination, took shelter for the winter in a place as near to it as she could safely go, and prosecuted her voyage the ensuing season. Here, had the ship been coming home, as the best means of getting finally to Reval, and there had been a possibility of her being able to accomplish that object when the loss happened, she might still have been considered in the course of the voyage insured; but all thought of completing the original voyage seems to have been abandoned on the 30th of November, and there is no colour for charging the underwriters with a loss which happened subsequently to her setting sail for England.

[456]

*Plaintiff nonsuited.*¹

Garrow and Puller for the plaintiff.

The Attorney-General, Carr, and Moore, for the defendant.

Brown and Irish v. Vigne.

12 East, 283-288 (11 R. R. 375).

Insurance. — Port of Destination in Hands of Enemy Termination of Risk.

[283] A ship was insured from London to any port or ports in the river Plate until her arrival at her last port of discharge in that river; and the master, intending to discharge her cargo at Buenos Ayres, passed Maldonado; but hearing that Buenos Ayres was then in the hands of the enemy, he went to Monte Video with intent to make a complete discharge there if the market were favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to Buenos Ayres, if it should afterwards be practicable; but while he was still discharging part of his cargo at Monte Video a loss happened by peril of the sea: *held*, that as Buenos Ayres, to which other port only in the Plate he had contemplated to go, was at the time of his arrival in the Plate (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, Monte Video must be taken to be the ship's last port of discharge, and that on her arrival there the policy was discharged.

This was an action upon a policy of insurance brought to recover against an underwriter a salvage loss of £24 3s. 2d. per cent;

¹ The plaintiff afterwards brought an action against the defendant on this policy, in the Court of C. P., which was tried at the sittings after last Michaelmas Term.

Sir JAMES MANSFIELD, as well as Lord ELLENBOROUGH, clearly thought that the

voyage was abandoned by the ship sailing for England instead of putting into Gottenburgh. The jury, nevertheless, found a verdict for the plaintiff; but in Hilary Term following the Court of C. P. set it aside, and ordered a new trial.

No. 46. — *Brown and Irish v. Vigne*, 12 East, 283, 284.

and at the trial before Lord ELLENBOROUGH, Ch. J., at Guildhall, a verdict was found for the plaintiffs, subject to the opinion of the Court upon this case.

The ship *Ann*, valued at £1500, was insured at and from London to any port or ports in the river Plate, with or without letters of marque, until her arrival at her last port of discharge in the river Plate. The plaintiffs were owners of the ship *Ann*, of which the plaintiff Irish was master, which in November, 1806, sailed from the port of London upon the voyage insured, and, on the 13th of February, 1807, arrived in the river Plate, and was on that day spoken to by His Majesty's ship, the *Unicorn*, the captain of which informed the master of the *Ann* that Buenos Ayres had been retaken from the British and was then in possession of the Spaniards. In consequence of this information the master of the *Ann* put into the port of Monte Video, which was then in possession of the British. On the 20th of February the *Ann* was removed to the place of delivery and there moored in safety: and on the 21st, part of the cargo, consisting of iron, spirits, and porter, was discharged; and between that day and the 6th of March following other parts of the cargo were landed; and on the latter day, while she was so moored, the *Harriet* transport, in a gale of wind, *drove athwart the hawse [*284] of the *Ann*, and on the 8th of the same month the *Ocean* transport also, in a gale of wind, ran foul of the *Ann*; by which accidents she sustained damage. The captain afterwards discharged the remainder of the cargo; and, having done so, a survey was held upon the *Ann*, in consequence of which the ship and materials were afterwards sold, and a loss sustained by the plaintiffs; which, if they were entitled to recover, was agreed to be £24 3s. 2d. per cent upon the defendant's subscription. When the *Ann* sailed from England the captain intended to proceed to Buenos Ayres. When he afterwards put into Monte Video, he intended, provided he could find a favourable market there, to dispose of his cargo at that place, and to finish the voyage; but, not finding so favourable a market at Monte Video as he expected, he had not at the time of the loss abandoned his intention of proceeding to Buenos Ayres, provided it should afterwards be practicable. Buenos Ayres was recaptured by the Spaniards in August, 1806, and has from that time to the present remained in their possession. The British armament under the command

of General Whitelock sailed from Monte Video in June, 1807, for the purpose of attacking Buenos Ayres, but the attack failed. Open war was waged between His Majesty and the King of Spain, from 1805 till August, 1808. The question was, whether the voyage insured under the above facts were or were not terminated at the time of the accident which occasioned the loss?

Richardson, for the plaintiffs, contended that, as the master had not abandoned his original intention to proceed to Buenos

Ayres, the voyage outwards was not ended, and the under-
[* 285] writers were still upon the policy, which * was from port

to port until the ship's arrival at her last port of discharge

in the river Plate. [Lord ELLENBOROUGH, Ch. J. — Does not the

last port of discharge mean the last practicable port? The master

could not have gone into Buenos Ayres, which was then an

enemy's port; and was he at liberty to protract the voyage for

that purpose till peace was restored? You would read the policy

as if it were, until her arrival at her wished-for port. BAYLEY,

J. Must not any port or ports be understood to be confined to

friendly ports?] While there is a possibility of the obstruction

being removed within a reasonable time, the risk of the under-

writers continues. The case which comes nearest to the present is

Blackenhagen v. The London Assurance Company, 1 Campb. 454,

564 [p. 650, *ante*]. There the ship, being bound under convoy

from London to Reval, on the 5th of November, learnt in the

course of her voyage that an embargo was laid on all British ships

in the ports of Russia, in consequence of which the convoy with

the fleet put back, first into Copenhagen roads and then off Gotten-

burgh; waiting, as it seems, to see if the embargo would be taken

off; and on the 30th of November the convoy and fleet sailed for

England, and was last seen on the 3rd of December in a heavy

gale of wind. Lord ELLENBOROUGH, Ch. J., nonsuited the plaintiff

in the first action on the policy, considering the returning to Eng-

land as an abandonment of the voyage. Then another action was

brought in C. B., in which the jury, to whom the question of

abandonment was left by the LORD CHIEF JUSTICE of C. B.,

found a verdict for the plaintiff; which that Court afterwards set

aside: but, on the second trial, the jury having found the fact

that the voyage was not abandoned, the Court of C. B. refused to

set aside the verdict. But even upon the first trial before

[* 286] Lord ELLENBOROUGH, * his Lordship said that if the ship,

being unable to get to Reval, had lingered in that quarter, or had necessarily returned with an intention of ultimately completing the original voyage, a question of nicety would have arisen.¹ [Lord ELLENBOROUGH, Ch. J. — There may be causes for a ship putting back for a time, without any intention of abandoning her voyage; as the approach of an enemy, or a temporary embargo; or as in a case which occurred before Lord KENYON, where a ship, bound to a port in the Baltic, found it on her approach blocked up by ice; on which she put back, but afterwards on a thaw sailed again; and Lord KENYON held that she was still under the policy.² But here the port of destination was in a state of open hostility at the time; which cannot be considered as a mere temporary obstruction.] The voyage here insured was a coasting voyage from port to port in the river Plate: and therefore greater delay in the voyage was contemplated than had actually occurred before the loss took place: and the underwriters wish to avail themselves of the intention of the master to go to Buenos Ayres, in order to put an end to the voyage, by the event which had happened there, before the master himself had contemplated to put an end to it. Would the capture of the destined port by an enemy while the ship is proceeding on *her voyage put an end to it and discharge the under- [*287] writers? [LE BLANC and BAYLEY, Justices, agreed that it would not, until the event were known to the ship. It has indeed been considered that after the port of destination has been shut, by order of the enemy, against ships of the nation to which the assured belong, he cannot abandon and recover as for a total loss. *Hadkinson v. Robinson*, 3 Bos. & P. 388 [in notes, p. 668–9, *post*.]

Carr, *contra*, was stopped by the Court.

Lord ELLENBOROUGH, Ch. J. — The policy is upon the ship until

¹ According to the report of the same case by Mr. Park, p. 226 of the 6th edit., Lord ELLENBOROUGH, Ch. J., said that “though a ship from necessity might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same. That such a necessity might perhaps even justify a return to England if it could be proved satisfactorily that it was the intention of the parties to seize the first favourable opportunity of returning to Reval.”

² If this be the same case, mentioned by his Lordship on the trial of *Blackenhagen v. The London Assurance Company*, as is mentioned in Mr. Campbell's Report, p. 455 [p. 651–2, *ante*], it appears that the ship, when prevented from reaching her destined port by the ice, “took shelter for the winter in a place as near to it as she could safely go, and prosecuted her voyage the ensuing season.”

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her arrival at her last port of discharge in the river Plate: there are three known ports in the river Plate; Maldonado, Monte Video, and Buenos Ayres; and we may suppose the insurance to have been to these ports by name until her arrival at the last of them. Now the ship had passed by Maldonado, and had arrived at Monte Video, and she could not legally go to Buenos Ayres, which was then in the hands of an enemy. If then the voyage did not end at Monte Video, as the last port of discharge, as soon as it was ascertained that she could not proceed to Buenos Ayres, when was it to end? It would never end till a peace was restored which would enable the ship to proceed to Buenos Ayres, if the master thought proper to wait for that event.

GROSE, J., agreed.

LE BLANC, J. — The Court must look in this case to the time when the vessel arrived in the river Plate; and then the master, being informed that Buenos Ayres was in the hands of [*288] the enemy, and that she could not go there as he *had intended, put into the port of Monte Video, and began to discharge her cargo there; and he never contemplated going to any other port than these two: Monte Video, therefore, must be considered as her last port of discharge.

BAYLEY, J. — It is said that the insurance was to any port or ports in the river Plate; but that must be understood to any friendly port. Now, after having passed Maldonado and gone to Monte Video, there was no other friendly port in the river Plate to which the ship could have gone.

Postea to the defendant.

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8 Q. B. 781-810 (s. c. 1 C. & K. 360; 15 L. J. Q. B. 274; 10 Jur. 875).

[781] Assumpsit on a policy of insurance on goods, at and from Liverpool to Lintin, Hong Kong, Macao, Canton, &c., or all or any other port or ports, place or places, in China, the East Indies, and the Indian and China seas, the Gulf of Siam or seas adjacent, particularly Manilla and Singapore, backwards and forwards, &c., with leave to transship or reship the goods on board the same or any other vessel or vessels, and from such other vessel, &c., to any other vessel, &c., at or off Singapore, Manilla, Macao, &c., or elsewhere in the Canton river, or on the coast of China, or in the China seas or Gulf of Siam, or seas adjacent, for Canton, Manilla, Singapore, or any other of the ports or places aforesaid, and with leave for the ship named, or any other vessel, &c., on board

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which the goods might have been transshipped, to proceed from any port, &c., in China, the China seas or seas adjacent, particularly the before-mentioned places, to any other ports or places in China, the East Indies, or the Indian or China seas or seas adjacent, and discharge the goods at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port or place of discharge: continuing the risk by land and water until the goods should be arrived at their final port of destination, and including all risk of boats, &c., and of transshipment as above mentioned. Premium 5 guineas, to return 50s. per cent. if the vessel discharged at Manilla direct or at a port in China in the usual course, the port being open, or 60s. per cent. if she discharged at Singapore direct. The count alleged a loss by perils of the seas before the goods were landed at their final place of destination.

Plea: That the ship arrived at Hong Kong on the coast of China, and that while she lay there, by reason that she could not safely proceed to any usual port or place of discharge in China, it was agreed by the agents of the assured that the goods should be finally discharged at Hong Kong, and thereupon they were by the said agents discharged out of the said ship into another ship, being a receiving ship appointed by them as a warehouse for receiving and storing the said goods: that Hong Kong, then and before the alleged loss, became the final place of destination, and the goods before such loss, were finally discharged and safely landed at such final place of destination.

Replication: That the goods were not, before the loss, discharged and safely landed at their final place of destination, in manner and form, &c. Issue thereon.

It appeared in evidence that the ship named (the *Penang*) sailed on the voyage insured, and met with a storm which damaged the ship and goods, not, however, rendering the ship unseaworthy. She arrived at Macao in June, 1841. There was no market for goods at Macao. Hostilities had taken place (but without formal declaration of war) between the Chinese and the English, who, in May, had stormed Canton. Before the *Penang* arrived, hostilities had been suspended; but peace was not finally established till August, 1842. The English naval commander on the Canton station did not prohibit British ships from going to Canton, at their own risk; but the Chinese were so much exasperated against the English, that the consignees at Macao of the goods on board the *Penang* deemed it unsafe for her to go to Canton; and they chartered another ship for three months, to accompany the *Penang* to Hong Kong (four miles from Macao), in order that the goods might be transshipped and examined, and might be in a place of safety till they could be sent to Canton or some other market when circumstances should permit. Hong Kong was considered a safe place for this purpose; Macao not. There was no market at Hong Kong. The consignees did not intend either to reship the goods on board the *Penang*, or to make Hong Kong the final place of deposit for sale. The goods, after being transshipped, were lost on board the second ship by perils of the seas.

On a special case, empowering the Court to draw such inferences as a jury might,

Held, That (assuming that question to arise on the pleadings) Canton was

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not such a hostile port as, in point of law, could not be considered a possible place of final destination: that, at the time of the transshipment, other places, in China and elsewhere, might have become the place of final destination within the intention of the policy; and that the plea, stating Hong Kong to have become, before the loss, the final place of destination, was not borne out.

This action was brought on a policy of insurance [* 782] effected, by and in the names of the plaintiffs as agents, * on 31st October, 1840, for the benefit of Garnett and Horsfall, cotton manufacturers at Clitheroe, on goods on board the ship *Penang* from Liverpool to China. The policy was effected with the General Maritime Insurance Company in London, and was subscribed by the defendants as three of the directors.

The declaration set out the policy, which was in the printed form used by the company: and the following were the terms of the risk insured.

The voyage was at and from Liverpool to Lintin, & or Hong Kong, & or Tongkoo, & or Macao, & or Whampoa, & or Canton, or all or any other port or ports, place or places, in China, the East Indies, and the Indian and China seas, the Gulf of Siam, or seas adjacent, particularly Manilla and Singapore, backwards and forwards

twice or oftener in any rotation, with leave to transship & or [* 783] * reship the interest insured by the said policy on board the same or any other vessel or vessels of any flag, and from such other vessel or vessels to any other vessel or vessels, at or off Singapore, Manilla, Macao, Lintin, Whampoa, or elsewhere in the Canton River, or on the coast of China, or in the China seas, or the Gulf of Siam or seas adjacent, all or any, for Canton, Manilla, Singapore, or any other of the ports or places aforesaid, and with leave for the ship named in the said policy, or any other vessel or vessels on board of which the interest might have been transhipped as above mentioned, to proceed from any port or ports, place or places in China, the China seas or seas adjacent, particularly the before-mentioned places, to any other ports or places in China, the East Indies, or the Indian or China seas or seas adjacent, and discharge the goods at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port or place of discharge; and with leave to call, touch, stay and trade, discharge, take in ¹ exchange goods, freight, specie

¹ So in the declaration.

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and passengers at all or any ports, parts and places, customary or not customary, on this side, at, and beyond, the Cape of Good Hope; and continuing the risk by land ^{&c} or by water until the goods should be arrived at their final port of destination; and including all risk of boats and craft and of transshipment from vessel to vessel as above mentioned, including the risk of craft to and from the vessel. The subject insured was stated to be 50 bales, and 100 trusses in 25 bales; goods valued at £5100. The premium in the policy was 5 guineas per cent, to return 50s. per cent * if the vessel discharged at Manilla direct [*784] or at a port in China in the usual course, the port being open, or 60s. per cent if she discharged at Singapore direct.

The declaration further alleged, that the General Maritime Insurance Company became insurers for £4000. That the vessel with the goods insured on board set sail from Liverpool on 1st November, 1840, towards China, and, on 27th June, 1841, arrived at or near Hong Kong on the coast of China; and that, afterwards and before the goods were landed at their final place of destination, and during the continuance of the risk in the policy, the goods were by the perils of the sea totally lost, and never were safely landed at their final place of destination. The declaration also contained counts for money had and received and upon an account stated. The defendants pleaded:

1. To the 1st count. That the goods were not by the perils of the sea lost to the plaintiffs, in manner and form, &c.

2. To the 1st count. That, after the ship sailed from Liverpool on the said voyage, to wit on 22nd June, 1841, the said ship with the said goods and merchandise on board thereof safely arrived at a certain place on the coast of China, to wit at Hong Kong, and that, whilst the said vessel was lying at Hong Kong aforesaid, and before the said alleged loss of the said goods, &c., to wit on the day and year last aforesaid, by reason that the said ship could not safely proceed to any usual port or place of discharge in China, it was agreed and determined by the agents of the assured that the goods, &c., should be finally discharged at Hong Kong aforesaid; and thereupon afterwards, to wit on, &c., at Hong Kong aforesaid, the said goods, &c., were *by the [*785] said agents of the assured discharged out of the said ship called the *Penang*, into and on board a certain other ship there, to wit the *James Laing*, the said last-mentioned vessel then being

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a receiving ship of the said agents of the assured, appointed and then used by them as and for a warehouse for receiving and storing the said goods, &c.; and the said goods, &c., were then, and before the said loss, safely discharged into and received on board the said last-mentioned ship or vessel as such warehouse of the said goods, &c. That the said place called Hong Kong then and before the said alleged loss became and was the final place of destination of the said ship called the *Penang*, and of the said goods, &c., in the first count mentioned, and the said goods, &c., then and before the said alleged loss were finally discharged and safely landed at their final place of destination, to wit in the manner aforesaid, at Hong Kong aforesaid.

3. To the 1st count. That the said ship, in the prosecution of the said voyage, arrived at Hong Kong on the coast of China; and afterwards, and before the said alleged loss, and during the continuance of the said risk, to wit on 1st July, 1841, the said goods, &c., in the said policy of insurance and in the said first count mentioned, were by the agents of the assured transshipped from the said ship called the *Penang* to and on board of a certain other ship there, to wit at Hong Kong aforesaid, then lying and being, called the *James Laing*; and that the said goods and merchandise were lost to the said plaintiffs after the said transshipment and whilst the said goods and merchandise were so on board the said last-mentioned ship or vessel: and that, at the [*786] time when the said goods and merchandise were *received and taken on board the said last-mentioned ship, to wit on the day and year last aforesaid, and from thence continually to the time of the said loss, the said last-mentioned ship or vessel was unseaworthy.

And, as to the last two counts, *non assumpsit*.

The plaintiffs joined issue upon the first and last pleas. To the second plea they replied: That the goods insured were not before the loss discharged and safely landed at their final place of destination, in manner and form, &c. To the third plea: That the ship *James Laing* was not unseaworthy, in manner and form, &c.

The action was tried at the Spring Assizes, 1844, at Liverpool, before ROLFE, B., when a verdict was found for the plaintiffs for £2879 1s. 10d., subject to the opinion of the Court on the following case.

The ship *Penang* sailed from Liverpool for China with a cargo on board of the value of between £80,000 and £90,000, consisting of British manufactured cotton and woollen goods, including the goods described in the policy, belonging to Messrs. Garnett and Horsfall, and of the value mentioned in the policy. The *Penang* set sail from Liverpool on the 1st November, 1840. She encountered some bad weather in the Bay of Biscay, but did not sustain any material damage; nor did anything material occur in the voyage until her arrival off the Cape of Good Hope; but when a little to the eastward of the Cape, she met with a violent hurricane, which threw her upon her beam ends, and her main and mizzen masts were carried away and the ship dismasted, and the maintop sail yard fell upon the deck, and stove in part of the deck for the breadth of three planks, by which a large quantity of water was let into the hold of the vessel, whereby the cargo sustained much damage. The *captain and crew, [*787] as soon as they could do so, cut away the wreck of the masts and rigging. The ship then righted; and they then set about securing the hole made in the deck, and rigging the ship with jury masts, which they succeeded in effecting, and then made the best of their way for the port of Singapore, which lies nearly in the direct route to China. The ship arrived at Singapore on the 13th April, 1841; and the captain then ascertained that he could get the ship remasted and fit to proceed to China within a month. The vessel was accordingly remasted and refitted, but did not get away from Singapore until the 8th June, 1841, when she sailed for China. She arrived in Macao Roads on the 22nd of June, 1841. On the arrival of the ship at Macao, Mr. Burn, the managing partner in the firm of M'Vicar and Co., the consignees of the cargo, did not, under the circumstances which then existed, and which are detailed in his evidence, afterwards referred to, deem it fit to send the ship up the river to Canton.

Under the circumstances stated in the evidence of Mr. Burn, hereinafter set forth, the *James Laing* was chartered by Mr. Burn. A copy of the charter of the *James Laing* was proved by Mr. Burn, and is hereinafter set forth, the original charter having been lost in the wreck of the *James Laing*, hereinafter mentioned. The *Penang* and the *James Laing* sailed for the harbour of Hong Kong in order to the transshipment of the goods from the *Penang* into the *James Laing* taking place there.

The two vessels sailed for Hong Kong on the 26th June, 1841, and arrived there on 28th June, 1841. Whilst the cargo was in progress of transshipment, a severe typhoon came on, by which the *James Laing* was wrecked, and all the goods [* 788] on board of her were either * totally lost or sustained great damage. The *Penang* assisted in endeavouring to save some part of the cargo of the *James Laing*, and remained at Hong Kong until 25th October, 1841, when she sailed with 630 chests of tea, put on board her as mentioned in the evidence hereinafter stated.

The case then ascertained the proportion of loss payable by the insurers, and the amount for which the verdict was to be entered, subject to the case, which was to set forth the above facts and the evidence in detail of Mr. Burn and Captain James Nias (such evidence to be taken as true), and the depositions of Captain Cumming, the master of the *Penang*, and Captain Pritchard, the master of the *James Laing*, which were read by the plaintiff at the trial, and copies of which were added as an appendix to this case, and to which either party was to be at liberty to refer as a part of the case.

The evidence was (briefly) to this effect: At the time of the arrival of the vessel in the China seas it was (owing to the hostile state of affairs between this country and China) not safe for the ship to go to any port in China. Hong Kong was practically the only port of safety within reach; but that there was no market for the goods there. The consignees of the cargo hired the *James Laing* to accompany the *Penang* to Hong Kong, and there to have the cargo, or part of it, transhipped.

The two vessels arrived safely at the usual place of anchorage at Hong Kong; and during the process of transshipment both ships were wrecked in a typhoon. The intention all along was to carry the cargo to a market in Canton as soon as it should be safe. This intention was never abandoned; and a part of the goods, which were saved, were ultimately taken to Canton and sold there.

[792] The seaworthiness of the *James Laing* was not disputed at the trial.

The Court was to be at liberty to draw any inference of fact from the evidence which a jury might draw. The question for the opinion of the Court was, Whether or not the plaintiffs

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are, under the circumstances, entitled to recover. If the Court should be of opinion * that they were, the verdict [* 793] was to stand; if of a contrary opinion, a nonsuit to be entered.

Martin, for the plaintiffs. — The plaintiffs are entitled to a verdict on the issue on the second plea. Hong Kong was not, within the meaning of the policy, the final place of destination. The final place of destination was the market to which it was intended to take the goods. There was nothing, beyond inconvenience and a certain degree of risk, to prevent the goods, after the transshipment into the *James Laing*, being sent on to Canton; there was no war between the Chinese and English, but only a feeling of ill-will and suspicion shown by occasional acts of violence. The harbour of Hong Kong, and the ship *James Laing*, constituted merely intermediate stages in the voyage; there was not even a town at Hong Kong. *Brown v. Vigne*, 12 East, 283 [p. 652, ante], was cited at the trial. There the policy was until arrival at the last port of discharge in the river Plate. The intended place of discharge was Buenos Ayres; but the ship arrived at Monte Video, which lies in the course to Buenos Ayres, and there commenced discharging, the master having learned that Buenos Ayres was in the hands of the Spaniards, with whom the English were formally at war; and he never went on to Buenos Ayres. Under these circumstances, it was held that Monte Video became the final port of discharge. The ground of the decision was, that the ship could not legally go on to Buenos Ayres, there being a formal war; but here that fact does not exist. Canton, in strictness, was not other than a friendly port. The *obstruction was treated as temporary; the *James* [* 794] *Laing* was hired for a limited period accordingly. In *Tierney v. Etherington*, cited in *Pelly v. Royal Exchange Assurance Company*, 1 Burr. 341, 343, 345, 348 [No. 53, 14 R. C. p. 30], it was held that goods placed in a store ship lying in one of the ports named in the policy, where the goods might, by the policy, be unloaded and reshipped in a British ship, were covered by the insurance; it appearing that there was no British ship there, and that, in such case, the custom of the port was to put the goods on board a store ship. The policy here provides for transshipping; and that is all that has been done. If it proved impossible to reach Canton, there is nothing to show that another port men-

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tioned in the policy might not be adopted as the place of final discharge. By the provision as to return of premium this appears to have been contemplated.

Sir F. KELLY, Solicitor General, *contra*. — The transshipment provided for was only a transshipment with a view to an ulterior voyage; here the voyage to Canton had become impossible, there being open war. A war *de facto* must affect an insurance exactly as a war declared. The goods therefore had reached their final destination when they were on board the *James Laing*, within the authority of *Brown v. Vigne*, 12 East, 283 [p. 652 *ante*]. That ship was not hired for any voyage: she was, in effect, a warehouse; and the goods were stored in her until the agents could determine what was the best mode of disposing of them. If they had been forwarded to a Chinese port, they would have been seized and the underwriters discharged. [PATTESON, J. — In [*795] *Brown v. Vigne*, the master intended to discharge at Monte Video if the market should be favourable.] That does not distinguish the case from the present, since here the goods had been carried as far as possible. Lord ELLENBOROUGH'S words apply: "The port of destination was in a state of open hostility at the time; which cannot be considered as a mere temporary obstruction." *Brown v. Vigne*, is cited in 1 Phillips on Insurance, 468, 469 (2nd ed. London, 1840), c. xi. § 2; and the author afterwards (p. 470) says: "The risk ends when the voyage is intercepted and broken up, by a peril not insured against. Insurance was made 'from New York to Bordeaux, free from loss or detention, in consequence of prohibited trade.' The vessel was prohibited to enter at Bordeaux. Chief Justice KENT said, 'The prohibition to enter, under the special provision in the policy, was equivalent to an actual termination of the risk by landing the goods,' " citing *Speyer v. New York Insurance Company*, 3 Johnson's Rep. Sup. C. &c. 88, 94. It is manifest that if the master continue his intention of entering a hostile port, waiting only till the hostility shall cease, that is not a temporary but a permanent obstruction; otherwise, the suspension might last for many years.

Martin in reply. — The illegality, if there was any, of proceeding to Canton, raises no defence under the second plea; the question is whether the policy was determined. [PATTESON, J. — Why is it considered impossible to go into an enemy's port?] Because

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the trading with an enemy is illegal. Here it might have been imprudent to go to Canton, but was not illegal. [PATTESON, J. — It would seem then that the case is hardly within *the alleged principle, unless an English commander [* 796] would have been justified in stopping the ship from going to Canton.] That is so. *Evans v. Hutton*, 4 Man. & G. 954, shows that, if an English commander had prevented the ship from going to Canton, when Her Majesty's government had not commenced war, his act would not have been recognised in a Court of law. There, to a declaration in assumpsit against a ship owner for not delivering plaintiff's goods at Canton according to contract, the defendants pleaded that they were prevented by certain officers of the Queen duly authorised in that behalf, and exercising the powers of Her Majesty's government on the high seas near Canton, to wit the superintendent of the trade of Her Majesty's subjects with China, and the commander of Her Majesty's naval forces there; and the plea, on demurrer, was held insufficient, TINDAL, Ch. J., observing: "The plea does not state that the prohibition was in exercise of the acknowledged prerogative of the Crown, of the right of declaring peace and war; nor does the case fall within the range of those which might be cited, in which the dissolution of the contract is shown, by showing that it is to carry goods to a party, who, by declaration of war, is made an enemy" (6 Jurist, 1043). If the goods, here, had been put into a warehouse at Hong Kong to await an opportunity of safe transport to Canton, the case would have been the same as it now is; the risk would have continued. [PATTESON, J. — It does not appear that the *James Laing* was not a carrying ship.] It does not. But the only question raised by the pleadings is whether or not the goods, before the loss, were discharged and safely landed at their place of final *destination. [* 797] The policy does not limit the assured to one transshipment. Its terms evidently show that it was framed in contemplation of the state of things existing in China. As to *Brown v. Vigne*, 12 East, 283 [p. 652, *ante*]: Buenos Ayres was a place with which the British government was actually at war: the case, therefore, stood as if that place had been struck out of the policy: a notion of the master that he might still go there could not make it an open market. The rule stated in 1 Phillips on Insurance, 470, that "the risk ends when the voyage is intercepted and broken

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up, by a peril not insured against," does not apply here, for the voyage was not "intercepted."

Lord DENMAN, Ch. J.

[805] Even if the Solicitor General is right as to the state of affairs at Canton, and the evidence proves the case relied on by him in that respect, the case does not bear out the material issue on the part of the defendants. The terms of the policy were calculated for a particular state of things, and the uncertainty which existed, whether or not we should be at war with China. But there is no pretence for saying that, when the facts stated in the case occurred, England had placed herself in a state of war with that country. The parties might provide for the contingency which actually happened, by stipulating that the vessel, or any other into which the cargo might have been transshipped, [* 806] might proceed to all or any of the * places named, and discharge there, "or remain at the same until it should be deemed expedient to proceed to the port or place of discharge;" that is, till the state of things had ceased which rendered it inexpedient to discharge at such place. But the provisions are so unlimited in their nature that they apply as much to Singapore as to places in China; and they contemplate a trading, not with a country which should have become our enemy, but with a power still at peace with us. In this case, therefore, the plaintiffs are entitled to recover.

PATTESON, J. — The first case turns entirely on the question, raised by the second plea, whether or not Hong Kong had become the ship's place of final destination before the loss. I think it had not. The policy was very general in its terms. It gave liberty to transship the goods at or off Singapore, Manilla, Macao, &c., or elsewhere in the Canton River, or on the coast of China, or in the China seas or Gulf of Siam, or in the seas adjacent, for Canton, Manilla, Singapore or any other of the ports or places aforesaid, with leave either for the original ship, or for any other into which transshipment should have been made, to proceed from any ports or places in China, the China seas, or seas adjacent, particularly the places before mentioned, to any other [* 807] ports or places in China, the East Indies, * or the Indian or China seas or seas adjacent, "and discharge the goods at any or all of the said places, or remain at the same until it should be deemed expedient to proceed to the port or place of dis-

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charge." As to Hong Kong being such port of discharge, it clearly was not, on the construction of the policy itself. There was no market at Hong Kong; and it appears from all the evidence that the parties did not mean it to be the ultimate port. Burn says expressly that the object in transferring the goods to the *James Laing* was, first to examine them, and secondly to have them in a place of safety till they could be sent to Canton or any other market where they could be sold. The Solicitor-General argues that going to Canton would have been illegal under the circumstances, and that *Browne v. Vigne*, 12 East, 283 [p. 652, *ante*] governs this case. But I think otherwise. It appears on the evidence that Captain Nias had no power to prevent any English ship from going up to Canton: a person taking a ship thither would have run the risk, not of offending against the law of England, but of committing an imprudence, and perhaps exposing his ship to confiscation. There had been hostile operations; Canton had been stormed; but hostilities had afterwards been suspended by convention, and not renewed: it might be dangerous and unadvisable to go up the Canton River, because of the disposition of the Chinese; but there was no prohibition. The case, therefore, is not like *Brown v. Vigne*, where the port was possessed by an enemy, the Spaniards, and to enter it might have been assisting them. Here, the going up to Canton would not have been assisting an enemy. * If the vessel had gone up, and been [*808] wrecked, the underwriters would have been liable. There was, then, no actual intention to make Hong Kong the ultimate port of destination, and nothing in law which required it. On the mere question of fact, the evidence is all one way. I do not think it appears (though there may be a doubt upon it) that any distinct intention was entertained to make Canton, exclusively, the ultimate port. I do not see why the goods might not have been sent to Singapore or any of the other ports named in the policy. In the provisions there made, the very circumstance which occurred seems to have been contemplated. I was at first struck with the observation that the *James Laing* was not a carrying ship but a mere place of deposit; but, assuming that to have been so, I do not know that the goods, when in such a place, would not still have been protected by the policy; and, secondly, I do not see that this question on the character of the ship is raised by the pleadings.

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[809] WILLIAMS, J. — I am of the same opinion. As to the first case : the state of affairs between this country and China when the policy was effected was a very undesirable one ; and the policy seems to have been framed with reference to it. The very description of the risk indicates that no precise port of discharge was contemplated ; and there is much weight in the observation upon the clause as to return of premium. Nothing prevents a recovery by the plaintiffs in this case, unless transshipment was in itself a termination of the voyage, or unless there was a termination by reason of war with China. As to the latter question, supposing it to be open on the pleadings, it does not appear that a war was existing. *Bellum justum* ought, indeed, to be prefaced by a proclamation, though sometimes people are so much in earnest that they do not wait for it : but here the evidence did not show that there was in fact any war. As to the former point, the very terms of the policy give an answer. Twice over, liberty is reserved to transship ; why was that introduced if it is now to be argued that when once the parties were rid of the original ship the risk was at an end ? I think, then, that the plaintiffs in this case are entitled to recover, as the risk was not to [* 810] Hong Kong, and was not in fact * terminated there.

*Verdict for plaintiffs to stand.*¹

ENGLISH NOTES.

A ship having sailed on a round voyage from A. to B., thence to C., and from C. back to A., was insured from C. to A. On arrival at B., the intention to sail from thence to C. was abandoned by force of circumstances, and the ship sailed back from B. to A., and thence to C., from whence she sailed for A., and was captured on the way. A special jury having found that the risk of the voyage from C. to A. was not materially altered by the difference of season arising from the delay, it was held that the voyage from C. to A. was well commenced, and the insured was entitled to recover. *Driscoll v. Passmore* (1798), 1 Bos. & P. 200, 4 R. R. 782.

Goods of a perishable nature were insured from A. to B., with the memorandum “warranted free from average unless general, or the ship be stranded.” In the course of the voyage the master received information that the port of B. was shut against ships of his nation, in consequence of which the commander of the convoy ordered the ship to proceed to another port, and the cargo was there sold by order of the

¹ COLERIDGE, J., was absent on account of ill health.

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Vice-Admiralty Court for a small sum of money. It was held by the Court, in a judgment delivered by Lord ALVANLEY, that the loss did not arise from a peril insured against, and the insured could not recover. "If," he said, "we were to decide that the sale at [the neutral port] was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers, whenever the cargo was not likely to reach the port of destination in a sound state, and, by giving notice of abandonment, to throw a loss upon the underwriters to which they are not liable by the terms of the policy." *Hudkinson v. Robinson* (1803), 3 Bos. & Pul. 388, 7 R. R. 786.

In *Porkin v. Tunno* (1809), 11 East, 22, 10 R. R. 422, the insurance was on goods at and from Bristol to Monte Video, or other port in the River Plate. This country was at the time at war with Spain. The ship after arriving at Maldonado at the mouth of the Plate was ordered off by the commander of the British squadron there, the enemy having got possession of every other part of the river. Being short of water and in want of repairs, the ship immediately bore away for Rio Janeiro in the Brazils, being the nearest friendly port of safety, and on the way there met with a peril of the sea by which the goods were damaged. Lord ELLENBOROUGH, at the trial, and the rest of the Court being of the opinion that the policy could not be extended by implication to cover the voyage to Rio Janeiro, non-suited the plaintiff, and the same Judge and the rest of the Court refused a rule to set the non-suit aside. Nothing was said in the report as to whether the voyage to Rio Janeiro was undertaken as a means of ultimately reaching the original destination; but it may be assumed that the Court did not draw any such inference from the facts.

In *Bold v. Rotheram*, an action on another policy on goods in the same voyage with those in *Oliverson v. Brightman* (and reported along with that case in 8 Q. B.), the question arose out of goods which had been transhipped on board the *James Laing*. The terms of the policy essentially differed in that there was no express liberty to transship the goods. And it not appearing that there had been any necessity for the transshipment for the purposes of the voyage, the Court held that this was a deviation, and directed a non-suit.

AMERICAN NOTES.

The *Blackenhagen Case* is cited in 1 Parsons on Marine Insurance, p. 586 ; the *Brown Case*, 2 *ibid.* 54, 63 ; the *Oliverson Case*, 2 *ibid.* 254.

In *Amory v. Jones*, 6 Massachusetts, 318, it was held that on abandonment from fear of capture the insurer is not liable as for total loss. So in *Richardson v. Maine Ins. Co.*, *ibid.* 102, 120 ; *Lee v. Gray*, 7 *ibid.* 349 ; *Tucker v.*

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United M. & F. Ins. Co., 12 *ibid.* 288. So where the voyage is broken up and abandoned by reason of chasing, and capture of ports. *Smith v. Universal Ins. Co.*, 6 Wheaton (U. S. Sup. Ct.), 176. "It was abandoned by the master *quia timebat*, and not because there was any actual direct restraint, which prevented the vessel from proceeding to the port of destination." Citing *Hadkinson v. Robinson*, 3 Bos. & Pul. 388, and *Lubbock v. Rowcroft*, 5 Esp. 50, "which have never been shaken."

In *Schmidt v. U. Ins. Co.*, 1 Johnson (N. Y.), 249, it was held that actual blockade of the port of destination justifies abandonment as for total loss (an immensely learned discussion by all the Judges, including KENT). So of an investment by hostile vessels of a port of stoppage. Citing *Olivera v. Union Ins. Co.*, 3 Wheaton (U. S. Sup. Ct.), 183, the Court said: "This cannot be considered an abandonment *quia timet*, when the danger was remote and contingent. The case shows very fully that the harbor of Gothenburg was so invested by the British squadron as to make it morally certain that the *Syren* would have been captured had she attempted to go out. A state of war existing between us and Great Britain, there could be no reasonable grounds even to hope that she would have been permitted to pass the squadron; and an attempt to escape would have been idle. The restraint therefore operated as effectually as if she had been actually seized. It would, to be sure, have been no violation of duty, or of national law, to have attempted to force through or elude the squadron; but it would have been madness in the master, and a violation of his duty to all parties, to have rushed headlong into the arms of the enemy when a loss would have been inevitable. The language of the late Chief Justice, in the case of *Craig v. The Union Ins. Company* (6 Johns. Rep. 252) is very strong on this point; and the principles laid down in that case are applicable here. It is there said that when such restraint actually exists, and is ascertained to be effectual, and no doubt arises of its being exerted, it would be most unreasonable to require the assured to go on, and submit to the experiment of a capture. This would be fatal to the interest of all parties; it would be against the duty of the assured, and he would be placed under a moral inability to do it."

In the *Craig* case, last cited, KENT, Ch. J., said: "When such restraint actually exists, and is ascertained to be effectual, and no doubt arises of its being exerted, it would be most unreasonable to require the assured to go on, and submit to the experiment of a capture, or the imminent hazard of the attempt. It would be fatal to the interest of all concerned. It would be against the duty of the assured, and he would be placed under a moral inability to do it. I admit the good sense of the rule that the assured shall not abandon *quia timet*, in cases in which the danger is remote or contingent, as where storms, cruisers of an enemy, or pirates, threaten a vessel *in transitu*. But I do not perceive the fitness of its application to cases in which the port of destination is discovered and duly ascertained in the course of the voyage to be shut by being in the possession of an enemy, or by interdiction of trade, or by a blockade. The restraint is as much felt, and operates as effectually, as if the vessel was actually seized. The act of entry, and the attempt to do it, becomes unlawful. It is as unlawful to rush into the arms of an enemy with your property as it is to break a blockade, or force

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an entry into a port, when an entry is prohibited by the sovereign of such port. There may be doubts as to the *terminus a quo*, or from what point the voyage is to be abandoned, and what species of demonstration of the danger the assured ought to require. But assuming the fact of the existence of such an impediment, and of the reasonable certainty that it would be made effectual, to the loss of the subject insured, the assured is justified in giving up the voyage and calling on the insurer to indemnify. It amounts to a loss of the voyage. No deviation can help the party, for the peril existed at the port of discharge; and if the restraint is not limited or transient, the *spes recuperandi*, as to the voyage, is as much gone as if the vessel was detained in the course of her voyage by an embargo or capture. I am aware that some late cases (*Hadkinson v. Robinson*, 3 Bos. & Pul. 388; *Lubbock v. Rowcroft*, 5 Esp. N. P. 50; *Blackenhagen v. London Insurance Company*, 1 Campbell's N. P. 450) go very far towards denying this right to the assured, if an English enemy creates the impediment; but in this respect I cannot at present concur in the distinction which they seem to assume, and when the case arises I shall choose to give it further consideration."

This vexed question was summed up as follows in *Thompson v. Read*, 12 Sergeant & Rawle (Penn.), 442, where the vessel was forbidden to enter a blockaded port: "The question is new in this Court, and not without difficulty, nor can it be said to be settled either in England or the United States; for Judges of great eminence have held different opinions. The general principle is agreed, that if the voyage is relinquished merely through fear of capture, the loss is not covered by the policy; but it is held by some that if the danger is so great as to amount almost to a certainty of capture, it is a peril for which the insurer is responsible, a restraint within the meaning of the policy. That this should be the law is certainly for the interest of all parties; if the voyage is abandoned, the property is saved and ceded to the insurers; but what advantage can it be to them for the insured to rush into danger with the certainty of loss? There seems to be a difference between arrests, restraints, and detainments. An arrest operates immediately on the subject arrested; so does a detainment, for it supposes the subject detained to be in the hands of the detainer. But there may be a restraint where the subject restrained is not in the hands of the restrainer. Capture includes an arrest. Capture, strictly speaking, is generally made for the purpose of condemnation; but neutrals are often arrested and carried into port for the purpose of investigation. An embargo is a detainment as well as a restraint. But a blockade may be a restraint without arrest or detainment. In the case before us there was more than the restraint of well-grounded fear. The ship was in the hands of a British cruiser, and thus prevented by actual force from entering the port of Sourabaya. This force was indeed withdrawn, but only for the purpose of suffering the ship to go on a different voyage. The blockade was continued with a force sufficient to prevent an entry, and this was certainly a strong and effectual restraint. It would seem therefore upon a fair construction, this loss fell within the scope of the policy, unless the meaning of the word "restraint" had been otherwise settled by adjudged cases. I do not know that in the English books a case is to be found exactly like the present.

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In *Hadkinson v. Robinson* and *Lubbock v. Rowcroft*, cited in 1 Marsh. 219, 220, the ship stopped at a port short of the port of destination, and there gave up the voyage on receiving the intelligence that the destined port was shut against her. But there was no force actually applied. It was decided that these losses were not by any peril insured against. In *Barker v. Blakes*, an American ship, being bound to a French port, was taken and carried into England, and while detained there information was received that she could not enter the French port. Being afterwards restored by a decree of the English Court, it was held that the loss was within the policy. But it was not decided how the law would have been, if the ship had not been carried into England, but relinquished the voyage on hearing that the port to which she was bound was shut against her. In *Blackenhagen v. The London Insurance Company*, 1 Campb. 454 ; Marsh. 838, note 135, an English ship bound to Reval, altered her voyage on hearing that a hostile embargo was laid on English ships in all the ports of Russia. Held, that the insurers were discharged whenever the voyage was altered, because fear of capture was not a peril within the policy. In *Parker v. Tunno*, Marsh. 839, an English ship was insured for *Monte Video*, or any other port or ports in the River Plate in the possession of the English. When she arrived in the River Plate, *Monte Video*, and every other port except Maldonado, was in the hands of the enemy (Spain), and the English commander of Maldonado ordered the ship immediately away, whereupon she proceeded straight to Rio Janeiro, the nearest friendly port. It was held that the insurers were discharged, because they had insured no other voyage than to some port in the River Plate. These are all the English cases which seem to bear on the point. None of them come exactly up to ours, because in none of them was the ship prevented by actual force from pursuing her voyage. Yet, I should rather suppose from the reasoning of the Judges that they inclined to the opinion that even if there was a boarding for the purpose of giving notice of an embargo, and a consequent relinquishment of the voyage, this would not constitute a loss covered by the policy. This was the decided opinion of the Circuit Court of Massachusetts, as appears by the opinion delivered by the late Chief Justice PARSONS, in *Richardson v. Maine Insurance Company*, 6 Mass. Rep. 102, and that Court still adheres to the same opinion, as we see in the case of *Brewer v. The Union Insurance Company*, 12 Mass. Rep. 170. But the contrary opinion is as decidedly held by the Chief Justice of New York, as appears by the cases of *Schmidt v. The United Insurance Company*, 1 Johns. 249, and *Saltus v. The United Ins. Co.*, 15 Johns. 523. Between such respectable authorities of our own country it would be hard and unpleasant to decide, were we not relieved by a decision of the Supreme Court of the United States, which turns the scale. I allude to the case of *Olivera v. The Union Insurance Company*, 3 Wheat. 183, where the contested principle was brought fully before the Court, and directly decided. The United States and Great Britain being at war, and Spain neutral, a Spanish ship bound outward was turned back by a British squadron blockading the bay of Chesapeake. It was decided that this was a restraint within the meaning of the policy. Chief Justice MARSHALL, by whom the opinion of the Court was delivered, after saying that a blockade was a restraint, adds

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‘that where a vessel attempting to come out is boarded and turned back, this restraining force is practically applied to such vessel.’ He also says (speaking of a vessel prevented from entering a blockaded port): ‘But if in attempting to pass the blockading squadron the vessel is stopped and turned back, the force is directly applied to her, and acts directly, and not circuitously.’ It appears then that the weight of authority in our own country supports what we take to be the true meaning of the word ‘restraint.’ The *Cordelia* therefore lost her voyage by a peril insured against, when she was boarded and turned back from the port of Sourabaya. What she did afterwards was for the benefit of the insurers.”

No. 48. — FORBES v. ASPINALL

(K. B. 1811.)

No. 49. — THE MAIN.

(ADMIRALTY, 1894.)

RULE.

A POLICY on freight to be earned on the adventure of a seeking ship only attaches in respect of the freight upon goods which have been put on board, or in respect of which there is a contract to ship them.

But if a cargo is put on board, although at a lower rate of freight than that stipulated in a valued policy — the valuation being fair at the time the policy was effected — the insurer is, in case of a total loss, bound by the valuation.

Forbes and Another v. Aspinall.

13 East, 323–332 (12 R. R. 352).

Insurance. — Freight. — Valued Policy. — Inception of Risk.

The valuation upon a freight policy of insurance is calculated upon all [323] the goods the ship is intended to carry upon the voyage insured: and if, by a peril insured against, the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportional share; as where freight valued at £6500 was insured on a ship from any port or ports in Hayti to Liverpool; and the ship which had sailed with goods from Liverpool to Hayti on a voyage of barter, after exchanging a part of her outward cargo for fifty five bales of cotton at one port of Hayti, proceeded with the same to another port, for the purpose of making a similar barter of the rest of the out-

ward cargo, but was lost by a peril of the sea before it was effected; the assured was only entitled to recover for the freight of the fifty-five bales of the return cargo on board; though there was a moral certainty at the time, that the remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo; for shortly after the loss of the ship, the goods saved from the wreck were in fact exchanged for more produce than was sufficient to have covered the freight insured.

But if there be a loss by a peril insured against of the whole subject-matter of the insurance to which the valuation applied, as of all the intended freight, where the insurance is on freight, the valuation in the policy will not be opened.

And in an action on a freight policy it seems sufficient to prove a contract under which the ship-owner would have been entitled to demand freight if the voyage were not stopped by a peril insured against.

This case came before the Court upon a motion for a new trial in an action on a policy of insurance, in which the plaintiffs had recovered a verdict at the sittings after last Trinity Term at Guildhall. It was first moved in the last term, when a rule to show cause was granted; and it was afterwards argued at length in the same term by the Attorney-General, Scarlett, and Richardson, on the part of the plaintiffs, and by Park and Littledale for the defendant. The Court took till this term to consider of their judgment; in delivering which the Lord Chief Justice went so fully into the arguments urged, and the cases cited at the bar, that it is unnecessary to repeat them.

The insurance, as it concerned this case, was on freight valued at £6500 upon the ship *Chiswick* "at and from any port or ports in Hayti to Liverpool, or her port of discharge in the United Kingdom." The declaration alleged that on the 9th of July, 1808, the ship was in safety in a certain port in Hayti, and that divers goods and merchandises were then and there loaded on board to [* 324] be *carried on the voyage insured; that the plaintiffs were interested in the freight, &c., to the amount insured; and that on the 15th July the ship, with the goods on board, was lost by the perils of the seas, and the plaintiffs thereby lost their freight, &c.

The facts proved and admitted were that the plaintiffs were the owners of the ship *Chiswick*; that she sailed from Liverpool with the goods to Hayti to trade there, and to bring home a return cargo of produce, and arrived at Hayti on the 4th of July, 1808, with goods to be there bartered for other goods to be brought back

to Liverpool. Part of the goods were accordingly bartered and exchanged for fifty-five bales of cotton, which were shipped on board at Jaquemel (on the south side of Hayti): the remaining part of her outward cargo was still on board, and would in all probability have been exchanged for other goods but for the loss after-mentioned. That the ship proceeded from Jaquemel to Au Cayes, another port of Hayti, to barter away the residue of her outward cargo, and to complete her lading home; and with such cargo, and the fifty-five bales on board, was in safety on the 15th of July, when, by the perils of the seas, she was driven on shore and lost. That the defendant settled for the freight of the fifty-five bales of cotton, without prejudice to the plaintiffs' claim for further loss of freight, if they were entitled to it. That the remaining part of the outward cargo, though damaged, was saved from the wreck, and, in twelve days after the loss of the ship, was exchanged for two hundred and fifty tons of coffee and one hundred tons of wood, the freight of which would have been of larger value than the sum insured on freight, if the ship had not been lost;

* Lord ELLENBOROUGH, Ch. J., now delivered the judgment [* 325] of the Court.

This was a motion for a new trial in an action upon a policy of insurance "at and from any port or ports in Hayti to Liverpool," &c., on freight valued at £6500. The ship had sailed from Liverpool to Hayti with a cargo intended for barter; had bartered away part of her outward cargo, and taken in fifty-five bales of cotton in part of her return cargo; and was proceeding from one port in Hayti to another; viz., from Jaquemel to Au Cayes, to barter away the residue of her outward cargo, and to complete her lading home, when she met with an accident by the perils of the seas which occasioned a total loss. If the plaintiffs be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss. Freight is the profit earned by the ship-owner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit to the ship-owner, in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon freight has no reference to the

hull of the ship, or to its outfit for the voyage; both of which are protected by insurance upon the ship; but its sole object is to protect the assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight,

it is incumbent on the assured to prove, that unless some [* 326] of the perils insured against had intervened * to prevent it,

some freight would have been earned; and where the policy is open, the actual amount of the freight, which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract, under which the ship-owner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight: and in either case, if the policy be open, the sum payable to the ship-owner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable. In this case, therefore, as there was no contract under which the ship-owner could claim freight but for goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton, which were shipped for this country, and of the premiums and commission thereon. And indeed that point has been settled against this very plaintiff in an action on an open policy on this very risk, in *Forbes and Another v. Cowie*, in Mr. Park's Addenda to the last edit. p. 604. The question, then, is, whether it makes any essential difference, that this is the case of a valued policy? And we are of opinion, upon full consideration, that it does not. The object of valuation in a policy is to fix by agreement between the parties an estimate upon the subject insured, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurances, which is merely to obtain an indemnity, he will [* 327] never go beyond * the first cost, in the case of the goods; adding thereto only the premium and commission, and, if he think fit, the probable profit: and in the case of freight, he will not go beyond the amount of what the ship would earn, with the premiums and commission thereupon. The valuation, however, in

the case of goods, looks to all the goods intended to be loaded; and in the case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured: and if by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part: and so, if by the perils insured against the freight of part only of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. If, for instance, the insurance be generally upon goods, and the goods intended to be protected be five hundred hogsheads of sugar, and a valuation be made accordingly, but the ship by accident takes on board one hundred only, and sails, and is afterwards lost by one of the perils insured against with those one hundred on board; can it be contended that the assured shall recover to the full amount of the valuation, that is for the whole five hundred, when he has lost only one hundred? So in the case of freight; if the ship would carry five hundred tons, and in fixing the valuation the assured calculate his freight upon five hundred tons, but when he reaches the loading port he can get ten tons only upon freight, and sails upon the voyage insured with those ten tons only, is it to be allowed that if the ship be lost by any of the perils insured against, and he thereby lose freight upon ten tons, he shall be entitled to the valuation * which includes [* 328] the freight upon five hundred tons? And yet to this extent the plaintiffs' argument in this case is carried. The proposition is monstrous: instead of confining the policy, as it ought to be confined, to a contract as nearly as may be of indemnity, against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured from being able to procure a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen. The Court, therefore, will look for very strong authorities before they yield to such a proposition. It was pressed, upon the argument, that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede, with this limitation, that is,

provided there is a total loss, by any of the perils insured against, of the whole subject-matter of insurance to which the valuation applied; viz., of all the intended cargo of goods, where the insurance was on goods; and of all the intended freight, where the insurance was upon freight. But if it be meant to carry that position to this extent, that the underwriter is not at liberty to inquire what was intended to have been included in the valuation; or when he has ascertained that point, that he cannot reduce the sum below the valuation, by proving that a part only of what was included in the valuation has been lost by a peril insured against; we deny the position when so extended. In *Shaw v. Felton*, 2 East, 109 (p. 631, *ante*), which has been strongly relied upon, the interest of the assured was in ship and outfit, including [* 329] provisions and sea-stores laid *in for slaves, and wages advanced to the crew: and the chief ground insisted upon for opening the policy was this, that the principal part of the provisions had been consumed in the voyage, and therefore had not been lost by the perils insured against. But that ground was resisted with effect, because the subject insured was to be considered as of the value ascribed to it when the voyage commenced; and if the diminution of the provisions were to be allowed to reduce the extent of the underwriter's liability upon the policy, every valued policy upon ship would be to be opened; because every day, after the voyage commenced, the quantum of the ship's provisions would be proportionably reduced. Mr. Justice LAWRENCE, in the opinion he gave, intimated distinctly, that upon an open policy such a diminution would not have varied the underwriter's liability. That case, when examined, does not appear to have proceeded altogether, if at all, upon a distinction between valued and open policies; it was not decided upon the ground that if part only of the subject intended to be covered by the policy, and included in the valuation, were lost by the perils insured against, the policy could not be opened, and the liability of the underwriters apportioned; but upon this ground merely, viz., that in the case of an insurance upon ship and outfit, if a total loss of ship occurred by a peril insured against, no deduction was to be made for provisions, &c., expended in the voyage before the loss occurred, or for the deterioration of the ship during that time; but that the underwriters were to be answerable for the original value, estimated in whatever manner such original value might be, as though

the loss had occurred the instant after the policy attached. Indeed where a loss occurs before any freight is earned, it would be unjust *not to charge the underwriters to that extent, [* 330] because by the event it has become of no avail to the assured that the provisions have been expended, and the ship used: and that case, as applied to the present, only decides that the underwriter is chargeable to the same extent. The only remaining case relied upon by the plaintiffs, which is material to be considered, is that of *Montgomery v. Egginton*, which is shortly reported in 3 T. R. 362 (1 R. R. 718). That was an action on freight valued at £1500. Freight to the amount of £500 only was on board when the ship was lost; but goods to the amount of the rest of the freight were ready to be shipped, and were lying on the quay for that purpose at the time. Lord KENYON told the jury, that if this were a *bonâ fide* transaction, and not a mere colourable insurance, and a gaming policy, the assured was entitled to recover for the whole value in the policy. The jury gave a verdict for that sum: and though a rule *nisi* for setting aside the verdict was obtained, yet the opinion of the Court being strongly against the rule, it was afterwards abandoned. The grounds of this decision do not appear: whether it proceeded upon a distinction between valued and open policies is not expressly stated: and it might be that upon an open policy in such a case, Lord KENYON and the Court might have thought that the assured would have been entitled to recover in respect of the freight on the goods on shore, as well as for the freight of those that were actually put on board. There might be circumstances in that case which would have entitled the ship-owner to full freight, had the owners of the goods on shore refused to let them be shipped, and the ship had sailed with that part only which she had on board: there might have been a contract for giving the ship a full loading; or it *might have been considered, (though it is difficult to [* 331] suppose that it was,) that as the residue of the goods to complete a cargo was ready to be shipped, and lying on the quay for the purpose, it was the same to the assured as if they really had been shipped. If that case, however, is to be considered as having decided that, upon a policy estimating the freight upon a full cargo at £1500, a loss by a peril insured against may be recovered to that extent when a third only of a cargo is obtained, and freight to the amount of such third could only have been

earned, and when it was uncertain whether more ever could have been procured, we should pause long before we allowed ourselves to adopt such a ground of decision: we should hesitate extremely before we should say that £1500, the calculated amount of the whole intended risk, should be paid for a loss of £500 incurred in respect of a third of the intended risk; in other words, that a total loss should be paid for a loss of only one-third of that which the parties to the insurance contemplated as the whole subject insured. It is sufficient, however, to say that that case is distinguishable from this in many of its circumstances. There a full cargo was ready to be laden, and the ship in a state ready to receive it, and nothing but the perils insured against did; or (as appears) could prevent its being received: here it was uncertain whether any additional cargo could have been ever procured, and the outward cargo must also have been discharged before the homeward cargo could have been completed: so that the ship was not ever in a condition to receive her homeward cargo, if the cargo had been ready, which it never was, to have been put on board. In a case, therefore, circumstanced as this is, where the valuation was with reference to freight upon a complete cargo; where a complete cargo, or anything [* 332] * like a complete cargo, never was in fact obtained, and for all that appears never might have been obtained; where there was no contract by any person to load a complete cargo, or pay dead freight, but the ship was a mere seeking ship; we cannot feel ourselves warranted in saying, that there has been a total loss by any peril insured against of that which the insurance was intended to cover, and which the valuation contemplated, viz., Freight upon a complete cargo; but are obliged to pronounce that no loss by the perils insured against is made out beyond the loss of freight upon part of a cargo only, viz., upon the fifty-five bales of cotton: that the assured are therefore not entitled to recover a total loss, but an apportionment only, according to the measure of their actual loss: and, as that apportionment has been already allowed to the plaintiffs, that there must be a new trial case.

The Main.

1894, P. 320-329 (s. c. 63 L. J. P. 69; 70 L. T. 247).

Insurance. — Freight. — Valued Policy. — Inception of Risk.

The plaintiffs, whilst their vessel was on her way to New Orleans, and [320] in anticipation of a full homeward cargo, effected a policy of insurance with the defendants for £1500, upon "freight valued at £5500," "at and from New Orleans to Liverpool," the insurance to commence from the loading of the cargo.

At the date of the policy this valuation was reasonable and proper upon a full cargo, having regard to the rates of freight then current at New Orleans and to the engagements of cargo for the vessel; but on her way out she met with an accident, and during the time occupied in repairs the rates of freight at New Orleans declined considerably, and the greater part of the engagements of cargo had to be cancelled. After some months' delay the vessel sailed for Liverpool with a full cargo, the total freight on which amounted to £3250, of which £952 was paid in advance. In the course of the voyage the vessel was lost by a peril insured against, and the total freight at risk, £2298, also lost. The plaintiff collected under other policies the sum of £3250, and in an action against the defendants claimed £1500 from them.

The defendants contended that the valuation must be opened, and that, on the actual amount of freight at risk, the plaintiff had been fully indemnified under other policies:—

Held, by GORELL BARNES, J., that the valuation was binding; but as freight to the amount of £952, had been paid in advance, and was therefore not at risk, the valuation of £5500, must be reduced by £1611, being the proportion of the prepaid freight to the gross freight, leaving £3889, as the value at risk, and as of this sum the plaintiffs had received £3250, the amount recoverable from the defendants was £639, with a small proportionate return of premium.

Action by plaintiffs, the Anglo-American Steamship Company, Limited, owners of the steamship *Main*, to recover from the defendants, the National Marine Insurance Association, Limited, a loss under a marine policy of insurance on freight.

The material facts were:—

On October 9, 1891, the *Main* left Hamburg for New Orleans, and on November 18, the plaintiffs effected, with the defendants, a marine policy of insurance, whereby, in consideration of one per cent, the defendants insured against all loss and damage by (*inter alia*) perils of the sea and fire, the sum of £1500 upon "freight valued at £5500" in the vessel "at and from New Orleans to Liverpool . . . the insurance to commence upon the

[* 321] *freight . . . from the loading of the . . . goods on board the ship."

At the date of the policy the valuation of the expected freight at £5500 upon a full cargo was reasonable and proper, having regard to the rates then current at New Orleans for the voyage in question, and having regard to the very large portion of her cargo which had been engaged by the representative of the owners of the vessel in contemplation of loading her in due course; but three weeks previously (October 28) the *Main* had grounded off the coast of Florida, and it was not until December 1 that she was towed into New Orleans. By December 21 her inward cargo was discharged, and she was shifted to a loading berth, but considerable repairs were required, involving so much delay that only a part of her cargo (consisting of 12,042 bushels of corn, 700 barrels of molasses, and 7080 staves) was loaded at the original rate, the remainder of the engagements for cargo (principally consisting of 5000 bales of cotton at 21/64*d.* per lb.) being cancelled, as the shippers could not wait.

On March 1, 1892, the *Main* left New Orleans for Liverpool with a full cargo (principally consisting of 4097 bales of cotton at 5/32*d.* per lb.), but the rates of freight (with the exception of that on the portion of the original cargo) being so much lower than those current when the policy was effected, the total amount of freight only reached £3250 7*s.*, of which £952 3*s.* 9*d.* was paid at New Orleans in advance on the shipment of the molasses (£282 18*s.* 4*d.*) and cattle on deck (£669 5*s.* 5*d.*).

In the course of the homeward voyage the vessel was lost by one of the perils insured against, viz., fire, and thereby the freight at risk, amounting to £2298 3*s.* 3*d.*, was also lost.

Of this sum the plaintiffs collected £2250 under a policy with a German marine insurance company for £2500, and £1000 under a policy with another company for that amount, making together £3250, and the plaintiffs now claimed £1500 in the present action.

The defendants alleged that the cargo for the carriage of which the freight was expected to be earned was never shipped, that the freight insured was never at risk, that the policy never attached.

and they paid the premium of £15 into Court; but
[* 322] *substantially the defence relied upon was that the valuation must be opened for —

(Par. 5.) "Of the freight valued at £5500 agreed to be insured

by the alleged policy only a portion amounting to £2800 or thereabouts, and no more, was ever at risk under the policy or was ever lost upon the voyage insured. The cargo shipped was shipped at lower rates of freight than had been intended when the policy was made, amounting in all to, and not more than, £3250 7s., and of this £952 or thereabouts was paid to the plaintiffs in advance and was not at risk."

(Par. 6.) "Before the commencement of this action the plaintiffs had been paid under other policies of insurance effected by them upon the freight at risk, upon the said voyage, sums amounting to more than £3250 and have thereby been fully indemnified against the loss of freight sustained by them."

Joseph Walton, Q. C., and W. F. Taylor, for the plaintiffs.

Sir Walter Phillimore and Carver, for the defendants.

The arguments of counsel fully appear from the judgment. In addition to the cases there mentioned, the following were referred to: *Ionides v. Pender*, L. R. 9, Q. B. 531; *Tobin v. Harford*, 34 L. J. C. P. 37 [p. 598, *ante*].

GORELL BARNES, J. (after dealing with the facts of the case, proceeded). — The substantial point raised before me, apart from a subsidiary point as to amount, involves chiefly this question, whether the plaintiffs can recover on the footing of the valuation in the policy effected by them with the defendants, or whether that valuation can be opened so as to entitle the plaintiffs only to recover upon the footing of what actually was at risk, with the result that in consequence of the payments already made to the plaintiffs they will have been fully indemnified for what was at risk, and therefore recover nothing on the policy.

In order to arrive at a solution of that question, I have to consider, first, whether the policy attached to and covered the freight on this voyage. The plaintiffs say it did, and that that being so the valuation applied to what was at risk on that voyage and is binding on the parties. And notwithstanding what is set

* up in the defence, I do not think it was really disputed [* 323] that the policy in fact attached upon this voyage to the freight which was at risk. The real contention raised by the defendants is that this valuation must be opened. Now, what was it that was valued in the policy? By the agreement of the parties it is freight valued at £5500 in the *Main* on a voyage from New Orleans to Liverpool. I think the freight so valued meant the

gross freight of the ship. The underwriters do not seem to have been told that some might be paid in advance, and, although there was a letter from New Orleans, from which it might perhaps have been inferred that the assured in taking out a policy meant to exclude the advanced freight, I do not think, looking at the facts, that they intended, when they took the policy out, or that the underwriters assented to or agreed, that what was valued was other than the gross freight for the voyage.

The defendants, however, say that that valuation was made upon the basis of the current rates at which the ship was practically engaged, and that, as much less was ultimately obtained, the valuation should be opened, and be treated as being at a reduced rate.

The plaintiffs, on the other hand, contend that the value agreed in the policy is the value agreed by both parties to represent the value of what actually was at risk on the voyage; and in support of that view they rely upon *Everth v. Smith*, 2 M. & S. 278 (15 R. R. 246), which they say shows that although the assured may take out a policy on freight generally with regard to what they then think will be the engagement of the ship, that policy will cover and attach to whatever is in fact freight on the voyage on which the ship sails, and I was referred to the following passage in the judgment of Lord ELLENBOROUGH (2 M. & S. 278, at p. 284; 15 R. R. 246 at p. 249): "This was an insurance on freight generally, not on any specific freight; the charter party is only material to show that upon the ship's arrival at Riga there was an inchoation of the risk. The underwriter did not insure that any particular freight should be brought home, but if any 'freight' is brought home, a loss has not happened for which he undertook to indemnify the assured." In that case there had been freight earned, and therefore there had been no loss. At the [* 324] close of his judgment * he says (2 M. & S. 278, at p. 286; 15 R. R. 246, at p. 250): "On the authority of the above cases, as well as upon general principles of law, it appears to us that the mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss where the particular thing insured has not received damage; and whether the freight earned be the particular freight contracted for by the assured, or a posterior freight, makes no difference; if the freight has been fully earned there can be no loss

properly demandable of the underwriters." It is clear that the Court held that, in a policy in similar terms, the freight which was actually earned on a voyage would be covered, although the assured in taking out his policy contemplated having a specific freight, but when he went to the underwriters he insured the freight in general terms.

I think, therefore, the policy in this case undoubtedly attached to the subject-matter at risk, and I now proceed to deal with the defendants' contention that the policy should be opened, and, consequently, that there ought to be a reduction, based upon what was in fact at risk, and not upon the valuation. In support of this contention, the defendants rely upon *Forbes v. Aspinall*, 13 East, 323 [p. 673, *ante*], but that case is only an authority for a very well-known proposition, viz., that where both parties contemplate the freight insured to be on a full and complete cargo, and when, in fact, part cargo only is shipped, the freight on the part cargo is all that is at risk, so that there must be what is called an opening of the valuation. In strictness, it is not an opening of the valuation, but is merely a reduction in proportion to the amount of cargo shipped, the valuation still being held binding as a valuation on that portion which is shipped.

I think if the judgment in that case is looked at carefully, it will be seen to be based on the principle that both parties had agreed that the freight which was valued was the freight on a full and complete cargo, and that, as this full and complete cargo was not shipped, but only part shipped, the value of what was at risk must be taken in proportion to the whole cargo, and that applied to the actual valuation agreed upon. That case is no authority for the contention that if the value of what is about

* to be shipped, or the value of the freight on what is [* 325] about to be shipped, is estimated too highly originally, and the assured is mistaken in his valuation, the valuation ought to be reduced. The truth seems to me to be that, with regard to that case, which is referred to throughout the whole of the text-writers, and with regard to other cases of a similar kind, the freight upon what is not shipped is never at risk, and, therefore, to that extent the underwriters cannot be made responsible.

There are several cases which seem to me to be in point in dealing with this particular question, though they were not cited before

me. For instance, one of the points put in argument by counsel for the defendants was, that if a cargo was about to be shipped under a policy in general terms on produce, and the assured could not ship as valuable a cargo as he at first intended, and shipped a cargo of much less value, then the valuation would not be binding. The plaintiffs contended that it still would be binding.

There is a case cited by the text-writers precisely on this point. It is referred to by Lowndes in his book on Insurance, 2nd edit. (sect. 32), thus: "But, excluding fraud and mistake, a valuation may be greatly in excess of the real worth of the thing insured, and yet hold good. In a case not reported, where an African merchant, expecting that his ship would be loaded on the coast with palm oil and ivory, insured the cargo, valuing it at £11,000, and by chance she was loaded with palm kernels, worth only some £3000, which was totally lost on the way home, he was allowed to recover the whole of the £11,000." The reference he gives is *Company of African Merchants v. Liverpool Marine Insurance Co.*, Mitchell's Maritime Register, vol. 15, p. 914; vol. 16, p. 145. I am not sure that the case quite bears out the statement made by the learned author; but M'Arthur in his book on Insurance (2 edit., p. 70) cites (in support of the same proposition as Lowndes) the case as *Company of African Merchants v. Harper*, in 1872, giving the same reference, and adding that the case is not reported, though I think that the case mentioned in the "Shipping Gazette" of December 2, 1872, is another case.¹

[* 326] * Upon the question of valuation there are two cases in the authorised reports which seem in point. The first is *Lidgett v. Secretan*, L. R. 6 C. P. 616, where a ship was insured, valued at £20,000, at and from London to Calcutta, and for thirty days after arrival, and then another policy was taken out for

¹ In "Maritime Notes and Queries" (edited by Sir William Mitchell, part 4, December, 1873, p. 222, 2nd col.) appears the following: "Insurable value":—

"If an underwriter takes a premium on a valued policy he must stand by his loss, whether the interest is undervalued or overvalued. In the 'Shipping and Mercantile Gazette' of the 2nd of December, 1872, will be found the case of the *African Company v. Harper*. Lord Chief Justice Cockburn in that case said: 'If underwriters insure a ship and cargo for £13,-

000, which in the event of disaster may only sell for £45, they chose to take the insurance at so much, and it is their fault if it turns out that they were overvalued. No doubt those valued policies afford an encouragement to fraud; but where there is no fraud proved, the underwriters cannot reopen the valuation, and they must suffer.' Mr. Justice BLACKBURN confirmed these views, and stated that the House of Lords had decided that, on a valued policy, the valuation could not be disputed except in case of fraud."

£10,000, at and from Calcutta to London. The ship was considerably damaged on the outward voyage, and was put into a dry dock for repair. While being repaired the outward policy expired, and she was afterwards totally destroyed by fire, whilst she was still in a damaged condition and only partially repaired. It was held there that, under the first policy, the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk, in consequence of the damage she had sustained on the outward voyage, without reference to the sum actually expended on her repairs; and that, under the second policy, the assured were entitled to recover as for a total loss: so that, although the valuation had been made on the basis of her being a sound ship under the second policy, and, in fact, she was a damaged ship worth much less, the assured recovered the full amount under the second policy. WILLES, J., said (L. R. 6 C. P. 616, at p. 627): "The second point arises upon the second policy, and is one of great importance, and one which has been the subject of much discussion and criticism both by lawyers and legislators; and yet nobody has been able to improve upon the practice as to valued policies, which has been recognised and adopted by ship-owners and underwriters, and has, at least amongst honest men, * the advantage of giving the assured the full value [* 327] of the thing insured, and of enabling the underwriters to obtain a larger amount of profit. It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case; and its abandonment would, in the end, as it seems to me, prove highly detrimental to the interests of the underwriters. . . . It is manifestly important that the owner should be able to insert a fair sum as the value of the vessel, treating her as sound, though she may at the time have sustained damage even to the extent of what may ultimately turn out to be a total loss; that being in fact one of the perils insured against." Then he refers to the case of *Barker v. Janson*, L. R. 3 C. P. 303, and says: "The result of the decisions in this country, as well as in the United States, and, I believe, in North Germany, is that the value mentioned in the policy is a conventional sum, not representing the real value of the vessel, but the sum to be paid by the underwriters in the event of a loss." Then he refers to the contention on the part of the defendants, and adds: "No authority has been cited for limiting the value to that extent. In the absence of fraud or

wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time." And MONTAGUE SMITH, J., says (L. R. 6 C. P. 616, at p. 631): "If the repairs had been completed before the second policy attached, the vessel would have been of the value mentioned in that policy; but that is a fact with which the underwriters on that policy are not concerned, because value is a matter which the parties have liquidated and ascertained at the time of entering into the contract, and which neither can open. It cannot depend on the actual value at the time of the loss, or at the time the risk attaches."

The case of *Barker v. Janson*, referred to by WILLES, J., is still more striking. There the ship was insured on a valued time policy — in the last case I mentioned it was on a voyage policy homeward — and its value stated in the policy was £8000. At the time the policy was made, but unknown to the parties, the ship had been injured in a storm, so that the expense of the [* 328] * repairs would have exceeded its value when repaired; the ship was therefore not worth anything. During the continuance of the risk the ship was totally lost. It was held that the policy attached, notwithstanding the previous injury to the ship, and that there being no fraud, the value of the ship as stated in the policy was still conclusive between the parties. WILLES, J., in giving judgment, said (L. R. 3 C. P. 303, at p. 306): "No authority has been cited for it (that is, for deduction), and I never heard of underwriters claiming such a deduction, nor can I see that it would be equitable, because it would be contrary to the contract. It is said that there was a mistake as to the state of the ship; but a mistake to entitle the parties to reopen a contract of valuation must be such as would entitle the parties to proceed in equity for relief. It must have been a mistake of both parties in respect of something which was material to the contract." And in conclusion he says (L. R. 3 C. P. 303, at p. 307): "In fine, as pointed out by PATTESON, J., in *Irving v. Manning*, 1 H. L. C. 287, so long as underwriters are willing to adhere to the system of valued policies, they must, where there has been no fraud, pay the stipulated amount."

These cases seem to me to be authorities for the proposition that, though the assured may value that which he intended should be at risk upon the basis of a value which ultimately turns out to be

erroneous, because of facts of which he had no knowledge at the time when he took out the policy, yet still, if the policy attaches, the amount which he has valued as that which is to be at risk is to be taken as conclusive and binding, although the amount which actually is at risk turns out to be very much less than was actually intended at the time of making the policy.

I therefore hold that the plaintiffs are right in maintaining that the policy covered the freight at risk on the voyage in question, and that the valuation is binding on both parties with regard to what actually came at risk under the policy, and that amount is £5500.

The subordinate question in the case is, what amount the plaintiffs are entitled to recover. A sum of £952 3s. 9d. was

* paid in respect of freight before the ship sailed. It was [* 329] paid, according to the admission of the parties, on the shipment of the goods to which the policy related, and therefore that sum never came at risk upon the policy. The result is that that sum, out of the sum of £3250 7s., was not at risk, and therefore the valuation of £5500 must be reduced in proportion to the rule-of-three sum arrived at by the relationship of £952 to £3250, as stated in the judgment of *Williams v. North China Insurance Co.*, 1 C. P. D. 757, and in the other cases cited. That, I understand from counsel it is agreed, would leave the sum of £3889, as being the value of what was at risk, taking the valuation in the policy during this voyage, and as the sum of £3250 has already been paid by other underwriters, the amount which is recoverable from the present defendants will be reduced to £639. That figure, if my view of this case is correct, — and subject to the premium of £15 paid into Court, and to the small addition of £4 7s. 6d. by way of return of a proportionate part of that premium, — is the amount for which the parties are agreed judgment must be entered.

Judgment for plaintiffs for £643 7s. 6d. (less amount paid into Court) and costs.

ENGLISH NOTES.

The decision in *Forbes v. Aspinall* was followed in *Denoan v. Home and Colonial Assurance Co.* (1872), L. R. 7 C. P. 341, 41 L. J. C. P. 162, 26 L. T. 628. The policy was to insure £1000 on freight valued at £2000. The intention was, according to the construction adopted by the Court, to insure the freight on goods carried, but not to insure

the passage-money of coolies, the carriage of whom and their provisions took up an unascertained portion of the room in the ship. The principle of calculation in *Forbes v. Aspinall* was adopted, with this difference, that, as there was no certain total representing a full cargo to which the proportion could be applied, the calculation must proceed as upon an open policy for half the loss of freight, not exceeding in any case £1000.

See also cases on "freight" in notes to *Spitta v. Woodman and Bell v. Hobson*, Nos. 32 and 33, pp. 583, 584, *ante*.

AMERICAN NOTES.

Forbes v. Aspinall is very frequently cited in Parsons on Marine Insurance, and it has been generally followed in this country. The prevailing doctrine was thus stated in Pennsylvania, in 1828, in *Adams v. Penn. Ins. Co.*, 1 Rawle, 106: "It was settled long ago that although the goods are ready to be loaded, yet if none of them are actually on board, and the vessel is driven from her moorings and lost, there can be no recovery on an insurance on freight. 2 Stra. 1251. But it has also been settled that if a vessel is chartered to go to T., and take in a load and carry it to B., and she is lost on the voyage to T., and never takes in any load, there can be a recovery on the policy on freight, on the ground, it would seem, that the contract to sail to T., and take in the lading and carry it to B., was one entire contract, and having set sail, the policy attached. 6 D. & E. 478. This ship sailed under a charter-party. It would seem to have been settled since, that if the vessel sails under a contract, or, being in a port, an express contract is made to load her, and she is fitted to take in such load, and is lost, there can be a recovery on the policy on freight. Indeed, there seems to be no doubt that a recovery may be had on such policy, if the vessel is loaded, though she has not sailed; or if she has an express contract for a load, though none of it is on board; or if she has set sail for the place at which she is to load, or if being at the place of loading her owners have commenced fitting her to receive and carry the loading *contracted to be carried*. The defendants say no case has gone beyond this, and the plaintiff insists that if there is a reasonable expectation of a load at a port, and a vessel sails for that port to take it in, the policy attaches; and if the vessel is lost by the perils insured against, the sum insured will be recovered.

"Most of the cases on this subject have been cited in the argument, and I have carefully examined them, and have come to the conclusion, that according to the decided cases the defendants are not liable in this case."

In *Hart v. Delaware Ins. Co.*, 2 Washington (U. S. Circ. Ct.), 346, it was held that except in a valued policy, the inchoate right to freight does not commence until the freight is put on board; yet if the freight is contracted for, the right begins with the voyage, although before the cargo is taken in. Citing *Tongue v. Watts*, 2 Str. 1251; *Thompson v. Taylor*, 6 T. R. 478. This is recognized in Massachusetts. *M'Gaw v. Ocean Ins. Co.*, 23 Pickering, 405.

In *Riley v. Hartford Ins. Co.*, 2 Connecticut, 370, however, the Court said: "It is said that the nature of the contract is that the insurers engage that the

insured shall not be prevented by any of the perils insured against from gaining the freight insured; that when the risk is once commenced, and there is a loss within the policy, the assured are entitled to the whole. But on this principle there may be an assurance of freight to any amount, and if the voyage is commenced with a cargo of the most trifling value, and there should be a loss, the assured would be entitled to recover the whole sum insured. Such is not the nature of the contract. The construction is that the assurers assure the sum mentioned on freight that shall once commence to be earned; not that the vessel shall take in a cargo, the freight of which shall equal the sum insured, and then that it shall not be lost by any of the perils insured against. From the nature of the contract the freight must exist by having a cargo on board the vessel before the policy can attach. Where such right to freight has commenced, there is something for the policy to operate upon, and the engagement is that such freight shall not be defeated by any of the perils insured against. If it be necessary that freight must commence to be earned before the policy can attach, then it follows that the insurance can operate only on such freight as actually exists, and cannot operate on the freight of a cargo expected to be laden on board the vessel; for it may as well be said that the insurance may attach when no cargo is laden on board the vessel, as on a part of the cargo not laden; and it is agreed that if no cargo is taken in, there can be no right on which the policy can operate.

“Such appears to be the true construction of the contract arising from the terms of it; and this is fully confirmed by the decision in the case of *Forbes v. Aspinall*, 13 East, 323. The cases generally relied on by the plaintiffs are where the ship-owner, by the contract of charter-party, became entitled to the freight if the voyage was not prevented by the perils insured against, and where there could be no doubt of his right to recover the whole sum on that ground.”

In *Livingston v. Columbian Ins. Co.*, 3 Johnson (N. Y.), 54, the charter-party having valued the freight, that amount was adjudged recoverable, by KENT, Ch. J.

In *Gordon v. Am. Ins. Co.*, 4 Denio (N. Y.), 362, the Court said (*obiter*): “In England and some of the American States there is no policy particularly adapted to insurance on freight; but the common form for insuring on ship or cargo is used, with only a brief memorandum in the margin, or elsewhere on the policy, stating the insurance to be on freight. And the practice was formerly the same in this State. In such cases, as the parties have omitted to declare when the risk shall commence, it has been left to the Courts to settle that matter for them. And it has been held that the policy attaches as soon as there is an insurable interest in the freight; and that as a general rule there is such an interest when the cargo is on board the ship, and not before. (*Tonge v. Watts*, 2 Str. 1251; *Smith v. Steinbach*, 2 Caines’ Cas. Er. 158; *Hart v. The Delaware Ins. Co.*, 2 Wash. C. C. R. 346; *Patrick v. Ludlow*, 3 John. Cas. 10.) But where there is a charter-party for a voyage, in the course of which the goods are to be taken on board and the freight earned, there is an inception of the risk the moment the ship breaks ground for the voyage, although the time for receiving the cargo has not yet arrived. (*Thompson v. Taylor*, 67

Nos. 48, 49. — *Forbes v. Aspinall*; *The Main*. — Notes.

R. 478; *Horncastle v. Stuart*, 7 East, 400; *Livingston v. The Columbian Ins. Co.*, 3 John. 49; *Moses v. Pratt*, 4 Campb. 297; *Williamson v. Innes*, 1 Moody & Rob. 88; 8 Bing. 79, note, s. c.) There is also an insurable interest when the shipowner has made a valid contract for freight with a third person, or has purchased goods to be shipped on his own account, and the ship is at the proper place ready to receive the cargo. (*Warre v. Miller*, 4 B. & C. 538; *Deraux v. J. Anson*, 5 Bing. N. C. 519; *Flint v. Flemmyng*, 1 B. & Ad. 45, post, p. 693; *Hart v. The Delaware Ins. Co.*, 2 Wash. C. C. R. 346.)."

In *Davy v. Hallett*, 3 Caines (N. Y.), 16; 2 Am. Dec. 241, KENT, Ch. J., observed: "This is the case of a valued policy upon freight, and the valuation becomes a very material fact in the consideration of the cause. The plaintiff was owner of vessel, cargo, and freight, and had them all fully insured: and the vessel being captured after the return voyage had commenced, he duly abandoned all the subjects to their respective insurers. The insurance was for two thousand dollars in value of freight; and if at the time of the total loss there was an inchoate right to a freight to the amount of the insurance, the plaintiff must be entitled to recover. This principle was fully established in the cases of *Montgomery v. Eggington*, 3 T. R. 362, and *Thompson v. Taylor*, 6 ibid. 478. In the present instance there was, when the vessel was captured, an inchoate freight attached equal to two thousand dollars. There was some freight already earned when the capture took place, but the amount of it becomes immaterial, as the valuation in the policy precludes inquiry into the value; and this valuation is to be adhered to, if the case be fair and honest between the parties, notwithstanding the events in the course of the voyage may render the loss even advantageous to the insured. *Shawe v. Felton*, 2 East, 109. It is sufficient if there be freight at risk equal to the sum insured when the loss happens, and that some freight has been already earned for the insured. If we were to sustain an inquiry into the value of the freight, it would be doing away with the effect of the valued policy."

In respect to overvaluation of freight the American doctrine is that nothing short of fraud can avail to defeat a recovery for the whole amount. Thus in Massachusetts a valuation of three times the actual value was enforced. (*Coolidge v. Marine Ins. Co.*, 15 Mass. 341.) The Court said: "The facts agreed prove that the freight was greatly overvalued; and it is contended that the policy is to be opened. Overvaluation is not conclusive evidence that the policy was with a view to gaming or wagering. It does not appear that when this policy was subscribed, the plaintiff knew the quantity of goods which the ship was to take on board at Amsterdam, or the price which was to be paid for their transportation to Philadelphia. In this state of uncertainty the parties agree that it shall be valued at a sum which eventually proves to be three times the value of the carriage of the goods. But we do not perceive that the estimate was unfairly made. The defendants were willing to take the premium upon that amount; and we do not feel at liberty to disregard the agreement which was made by the parties to prevent litigation, and upon a good consideration."

The Court distinguished *Forbes v. Aspinall* on the ground that in the case at bar "It is not found that the ship did not take in all the cargo which

No. 50. — *Flint v. Flemyng*, 1 Barn. & Adol. 45. — Rule.

could have been procured at Amsterdam," stating the *Forbes Case*, quoting its statement that when there is a total loss of all the intended freight the valuation is controlling, and concluding, — "Now in the case at bar the whole subject-matter to which the valuation applied has been loss."

No. 50. — FLINT *v.* FLEMYNG.

(1830.)

No. 51. — BARBER *v.* FLEMING.

(1869.)

RULE.

IN an insurance on "freight," the term may be applied to the benefit the shipowner would have derived by carrying his own goods in his own ship, and in such a case the policy may attach as soon as there is an actual contract for shipping the goods—the ship being in the course of the voyage insured.

Where there is an insurance of chartered freight, meaning the hire stipulated under contract for a voyage which the ship is under the contract bound to perform, the risk commences immediately upon the making of the contract, if the shipowner, on his part, is on the way towards earning the freight.

Flint v. Flemyng.

1 Barn. & Adol. 45–49.

Freight. — Benefit to Shipowner by carrying his own Goods. — Commencement of Risk.

A shipowner having effected a policy on freight, may, in the event of loss, [45] recover from the underwriter the value of the benefit he, the shipowner, would have derived (if there had been no loss) by carrying his own goods on the voyage insured.

The risk on freight does not attach until goods are either actually shipped on board, or until there is an actual contract for shipping them.

This was an action on a policy of insurance, dated the 7th January, 1828, on freight on the ship *Hope*, at and from Madras to

London. At the trial before Lord TENTERDEN, Ch. J., at the London sittings after Trinity Term, 1829, it appeared that the ship insured sailed on her outward voyage on the 5th of August, 1827, and arrived in Madras roads on the 30th of November in that year. From that day till the 5th of December the crew were employed in discharging the outward cargo, and on the 6th of that month the vessel was lost by the perils of the sea. No part of the homeward cargo was then shipped, but the captain had purchased at Madras, * by order and on account of the plaintiff, his owner, 25 tons of redwood; and a commercial house then trading under the firm of Binny and Co. had contracted to ship 122 tons of saltpetre; and Webster, one of the partners in that house, engaged to ship 90 tons of light goods, but as to those goods there was not any contract in writing. It was objected, that the plaintiff could not recover on a policy on freight the loss which he sustained by having been deprived of the opportunity of carrying his own goods in his own ship; secondly, that there was no contract to ship the light goods, and as to them, therefore, that the risk had not attached. Lord TENTERDEN was of opinion, that though the profit made by a shipowner by carrying his own goods in his own ship was not, strictly speaking, freight, yet that that word, according to mercantile language, might, in a policy of insurance, fairly mean that profit which a shipowner expected to make, by employing his ship to carry his own goods; and as to the 90 tons of light goods, he told the jury, that if the captain had a reasonable assurance that they would be shipped, the assured had a right to recover, in respect of them, the freight which the vessel would have earned if they had been shipped and she had performed the voyage, though there was not any such contract as could be enforced by action. A verdict having been found for the amount of the freight of all the goods, a rule *nisi* was obtained for a new trial, on the ground of misdirection upon the two points above stated.

Campbell, F. Pollock, and Hutchinson now showed cause.— Freight, strictly speaking, signifies a sum of money paid to the owner of a ship for the carriage of goods. It is the in[*47] variable practice to insure the *profit which an owner derives in carrying his own goods in his own ship under the name of freight. Between assured and underwriter, therefore, the term "freight" is understood to signify such a profit; and if so, there

can be no objection to the plaintiff's recovering, under that word, the profit which would have been acquired by reason of the carrying of his goods in his own ship if it had arrived. Then as to the light goods, the assured had a sufficient interest in the freight of those goods to entitle him to recover. It is undoubtedly true that there must be a contract; but here there was evidence of a contract, for Webster engaged to ship the light goods. That would be a sufficient statement of a contract in a special case. In *Warre v. Miller*, 4 B. & C. 538 (28 R. R. 382), proof that the captain before he sailed had made engagements with several persons for a homeward cargo was considered to be evidence of a positive contract, and was so submitted to the jury. The contract need not be by deed nor in writing. *Patrick v. Eames*, 3 Camp. 441; *Truscott v. Christie*, 2 Brod. & Bing. 320 (23 R. R. 446). In *Parke v. Hebsen*, cited 2 Brod. & Bing. 326 (23 R. R. 451), the contract was deducible only from letters.

The Attorney-General and Maule, *contra*. — It is difficult to contend that, as between assured and underwriter, the term "freight," as used in a policy, does not include the additional value given to the shipowner's goods by reason of their carriage in his own ship from one place to another. But upon the other point, assuming that there was some evidence of a contract by Webster to ship the light goods by the *Hope*, the question whether such a contract in fact existed was not submitted to the jury.

* Lord TENTERDEN, Ch. J. — If it be a necessary ingredient [*48] in the composition of freight, that there should be a money compensation paid by one person to another, the benefit accruing to a shipowner from using his own ship to carry his own goods is not freight. But if the term "freight," as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the shipowner whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in a policy. Before the statute of 19 Geo. II., c. 37, it was not necessary to prove any interest in the subject-matter of insurance. Since that statute, it would be as good a proof of

interest in freight, to show that the owner of a ship was conveying his own goods in his own ship, as that he was conveying the goods of others.

Then as to the other point, to recover upon a policy on freight, the assured must prove that but for the intervention of some of the perils insured against, some freight would have been earned, either by showing that some goods were put on board, or that there was some contract for doing so. The question was not submitted to the jury, whether there was any contract between Webster (acting on the behalf of Binny and Co.) and the captain for the shipment of the light goods. The defendant, therefore, is entitled to a new trial upon that ground; but he must, at all

events, have a verdict against him for the amount of the [* 49] freight on the redwood* and saltpetre. It would, therefore,

be advisable for the defendant to pay to the plaintiff the costs of this action and the freight of the redwood and saltpetre, and that he should undertake to pay the freight of the light goods, if, on reference to an arbitrator, it shall be found that there was a contract to ship those goods.

BAYLEY, J. — I am not aware that it has ever been decided that a party is entitled to recover, upon a policy of insurance for freight, for a loss accruing to him by reason of his having been deprived of the means of carrying his own goods in his own ship, but I have no doubt whatever that he is. Whether the shipowner carry his own goods or the goods of another person, is immaterial to him. In either case he has to pay the whole expense of the ship, of provisions, and of wages; he may fairly expect to reimburse himself out of the profit he may derive from carrying goods being his own property, or that of others, and he may insure that profit under the name of "freight," whether it accrue from the price paid for the carriage of the goods of others, or from the additional value conferred on his own goods by their carriage.

PARKE, J. — I am of the same opinion. The term "freight," as applied to the interest of the assured in this case, is somewhat inaccurate, but the meaning as between the parties to the instrument is quite intelligible.

It was referred to a barrister to ascertain whether there was a contract to ship the light goods, the defendant undertaking to pay the costs of the action, and the amount of the freight of the redwood and saltpetre.

Barber v. Fleming.

L. R. 5 Q. B. 59-76 (s. c. 39 L. J. Q. B. 25; 18 W. R. 254; 10 B. & S. 879.)

Chartered Freight, Interest in. — Marine Insurance. [59]

The plaintiff, on the 7th of August, 1866, chartered his ship C., “now lying at Bombay,” for a voyage from Howland’s Island to a port in the United Kingdom, for a full cargo of guano, freight to be paid at port of discharge; the ship to be at the island on or before the 1st of June, 1867, or the charterer to have the option of declaring the charter void. The plaintiff on the 7th of September, 1866, effected an insurance with the defendant, at and from Bombay to Howland’s Island, while there, and thence to any port in the United Kingdom, on freight chartered or otherwise, valued at £3600, in the ship C.; and it was made lawful for the ship to sail to, touch and stay at any ports whatsoever, without prejudice to the insurance, which was against the usual perils. The ship sailed from Bombay, in ballast, on the 4th of October, 1866, for Howland’s Island (one of the Chincha islands) intending to call at a port in New Zealand for water. She got on shore on the coast of New Zealand on the 25th of December, and was so much damaged that the plaintiff was obliged to abandon the voyage.

Held, that, as the ship had sailed in ballast from Bombay with the sole object of going to Howland’s Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced; and that the plaintiff could recover the loss under the policy.

Declaration, on a policy of insurance, from Bombay to Howland’s Island and thence to the United Kingdom, on freight, chartered or otherwise, in the ship *Cambodia*, underwritten by the defendant for £100, to recover freight under a charter-party from Howland’s Island to Great Britain, that the ship being wholly lost on her way from Bombay to Howland’s Island, by perils insured against, the chartered freight was wholly lost.

The material pleas were: 5. That the ship was not lost by the perils insured against. 6. That the chartered freight was not lost by the perils insured against.

Issue thereon.

At the trial before HANNEN, J., at the sittings in London after Hilary Term, it appeared that the agents of the owners of the barque *Cambodia*, then at Bombay awaiting orders for her homeward voyage, on the 7th of August, 1866, chartered the vessel at Liverpool to P. W. Penhallow.

The following are the material parts of the charter-party. It was made between the agents for the owners of the ship *Cambodia*, now lying in the harbour of Bombay, of the first part,

[* 60] and P. W. *Penhallow, of the second part, and chartered the whole vessel for a voyage from Howland's Island, situated in lon. 176, 30 W., and lat. 0.47 N., to a port of discharge in Great Britain . . . for a full and complete cargo of guano at Howland's Island (which the charterer engaged to provide), at the rate of 65s. per ton of 2240 lbs. weight delivered of guano. Freight to be paid at the port of discharge. The ship to be at Howland's Island on or before the 1st of June, 1867, or the charterer to have the option of declaring this charter null and void.

On the 7th of September, 1866, the plaintiff, on behalf of the owners of the *Cambodia*, effected an insurance at Lloyd's, which the defendant underwrote for £100.

The following are the material parts of the policy. The insurance was "at and from Bombay to Howland's Island, while there, and thence to any port or ports, place or places of call and discharge in the United Kingdom, in any order . . . upon the ship or vessel called the *Cambodia*." It was made "lawful for the ship in this voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, without prejudice to this insurance," which was "£2000 on freight, chartered or otherwise, valued at £3600;" the perils being, *inter alia*, of the seas; with the usual suing and labouring clause.

The *Cambodia* sailed from Bombay for Howland's Island (one of the Chincha islands), in ballast, on the 4th of October, 1866, intending to call at Auckland in New Zealand to complete her supply of provisions and water. She got out of her course, and struck on the bar of Manakan harbour in New Zealand on the 25th of December. She was got on to the sand, and surveys were made, and the captain endeavoured to borrow money for repairs, but was unable to get any, except on a bottomry bond at 35 per cent, and on the condition that the captain should charter the vessel to the lender for a cargo of timber from New Zealand to England. Communication was made to the owners in England; they refused to allow any repairs to be done; and in March, 1867, they gave notice of abandonment to the underwriters on ship, and in April to the underwriters on freight. The money, which had been advanced in the meantime, £3500, was insufficient for the repairs; and an agent from England, acting on behalf

[* 61] of the owners and underwriters *on ship, came out in June,

1867, and, after surveys and consultation, he determined that the best thing to do was to abandon the ship to the holder of the bottomry bond, which was accordingly done; and at the trial the agent deposed he was still of opinion that that was the best course. Ultimately the ship came home in March, 1868, with the cargo of timber.

A verdict was entered by consent for the plaintiff for £100, with leave to move to enter the verdict for the defendant, the Court to have power to draw inferences of fact.

A rule was accordingly obtained to enter a verdict for the defendant, on the ground that there was no loss of freight within the policy, and that no freight attached, and that the plaintiff abandoned the chartered voyage, and so lost the policy by his own act.¹

Manisty, Q. C., showed cause. — The facts are shortly these. The plaintiff having a charter on his ship at Bombay for a cargo from Howland's Island to the United Kingdom, and a valued policy with the defendant on freight, chartered or otherwise, on a voyage from Bombay to Howland's Island, and thence to the United Kingdom, the ship sailed from Bombay in ballast direct for Howland's Island, and was so much damaged by perils of the sea on the coast of New Zealand, that the ship and the voyage from Howland's Island were properly abandoned, although the ship ultimately brought a cargo of timber home from New Zealand. The only question is, whether, the ship never having reached Howland's Island, the chartered freight can be said to have been lost. Had she been sailing on a seeking voyage, no doubt there could be no loss until she had got to port and obtained a cargo; but here there was a charter-party; and freight under an existing charter-party is clearly an insurable interest, and may be recovered although the ship be lost before getting to her port of loading. The cases are collected in 1 Arnould on Insurance, 3rd ed., p. 419–420; and the case most * in point is [*62] *Davidson v. Willasey*, 1 M. & S. 313 (14 R. R. 438).

In that case, a ship was chartered from Liverpool to Jamaica, there to take in a full cargo for Liverpool; the shipowner effected a valued policy on freight at and from Jamaica to the United

¹ As to the last ground of the rule, the Court intimated more than once during the argument that they had not intended to grant it on that ground, and that by the reservation at the trial it could not have been meant to leave to the Court the question whether the voyage had been properly abandoned. See also the judgments, *post*.

Kingdom; and while at Jamaica the ship was lost by storms after taking part only of her cargo on board; and it was held that the owner was entitled to recover for a total loss.

[COCKBURN, Ch. J. — That is very far from the present case. There the ship had reached the port at which she was to take the cargo under the charter-party.]

The principle of the judgments of the Court apply. Thus, Lord ELLENBOROUGH, Ch. J., says (1 M. & S., at p. 316): "The interest intended to be insured was the freight which the assured would have earned under the terms of the charter-party, if the voyage had not been stopped by the perils insured against, which has been held for upwards of twenty years past to be an insurable interest as freight. Then the question is, whether the assured were in the prosecution of that interest, so as to have acquired an inchoate right to the freight at the time when the loss happened. We cannot allow any weight to the arguments used to prove that they were not, without setting aside the cases of *Thompson v. Taylor*, 6 T. R. 478 (3 R. R. 233), and *Horncastle v. Stuart*, 7 East, 400 (8 R. R. 649), which are precise upon this point; and there seems to be no reason for disturbing them. The distinction between this case and *Forbes v. Aspinall*, 13 East, 323 [p. 673, *ante*], has been truly stated, and is a clear one: there, there was no charter-party, and the valuation of the policy was made with reference to freight upon all the goods intended to be carried on the voyage insured, a part only of which goods were lost, and the rest never were or might have been obtained; so that the loss was not total within the meaning of the valuation: but here the valuation is made with reference to the freight under the charter-party, the whole of which the plaintiffs have been prevented from earning by one of the perils insured against. The loss, therefore, is total within the meaning of the policy." And LE BLANC, J., says (1 M. & S., at p. 317): "The prior cases determined that in the case of a freight policy, where the assured has entered [* 63] into a contract for freight, under * which, except for the wrongful act of the party with whom he has contracted, he would be in a condition to earn his freight, if the voyage were not stopped by a peril insured against; there, if the voyage has commenced in which the freight is to be earned, and be stopped by any of those perils, the assured will be entitled to recover to the full amount."

[COCKBURN, Ch. J. — Had the chartered voyage here commenced ?]

Not strictly speaking; but the voyage covered by the policy had; and the question is, whether the risk on the chartered freight had not attached. In the first place, the freight is paid and calculated, no doubt, not only in respect of the voyage from Howland's Island home, but from Bombay to Howland's Island, where the ship was at the time of the charter. And how can a ship-owner having such a charter as this, insure the chartered freight against the perils of the voyage while the ship is on her way from Bombay to Howland's Island, except in the form of the present policy for the whole voyage?

[BLACKBURN, J. — I find this in Phillips on Insurance, § 335. "A vessel being chartered from A. to B., the interest in the freight commences under the charter-party on the vessel's sailing for A., either in ballast or with a small quantity only of goods for B." And Mr. Phillips explains the last qualification, that if the vessel were going on a voyage in the *interim* it would be another thing; but he lays it down as a general proposition that if she is starting solely with a view to the chartered freight, the interest would attach on her sailing for A.]

That is exactly the present case; the vessel sailed for Howland's Island in ballast. In the common case of a vessel sailing out and home for a cargo under a charter home, could it be said you could not recover under a policy on the voyage out and home for the loss of the chartered freight because the vessel never reached the port of loading? For the purpose of the policy the voyage out and home is one, though the chartered voyage may be part only of it. The vessel being at Bombay, the owner, having a charter from Howland's Island home, wants to insure on the whole voyage, not only his vessel, but the beneficial contract which he has got, and which is just as much in danger of being lost by the voyage * to Howland's Island as it is on the voyage thence [* 64] home. It cannot be denied that freight under a charter is an insurable interest; and the interest must commence, at all events, as soon as the vessel sails on the voyage within the policy for the sole purpose of earning the chartered freight.

Milward, Q. C., and Fullarton, in support of the rule.— There are many peculiarities in this case which distinguish it from any case cited. The charter-party is not in the usual form, that the ship, being at Bombay, shall with all convenient speed sail

thence for Howland's Island, and there take in the cargo; the only stipulation is, that she shall be at Howland's Island by the 1st of June, about ten months after the date of the charter, the voyage from Bombay direct taking about three months. The plaintiff, therefore, was at liberty to go anywhere, so long as he reached the port of loading by the specified time. The plaintiff, then, having this charter, does not insure this specific freight, but, in general terms, "freight chartered or otherwise" from Bombay to Howland's Island, and thence to Great Britain, with leave to call at any intermediate ports; so that the policy was wide enough to cover freight earned between any ports from Bombay to Howland's Island; and it was a valued policy.

[BLACKBURN, J. — If the ship had had freight from Bombay or any intermediate port to Howland's Island, the policy would seem wide enough to cover it. But she sailed in ballast direct for the island. Or had she gone on a seeking voyage, the case would have assumed a different aspect, and it might be a very different question, whether in that case the interest in this chartered freight could be said to have commenced. But the ship having sailed in ballast for the sole purpose of earning this chartered freight, the question is reduced to this, — under these circumstances can it be said there was such an interest in the freight that it was at risk and so lost? Some cases have been cited to show that there was an inception of the risk; can any be cited to the contrary?]

Sellar v. M'Vicar, 1 B. & P. (N. R.) 23 (8 R. R. 744), shows that while sailing from Bombay to Howland's Island the voyage as to the chartered freight had not begun.

[* 65] * [COCKBURN, Ch. J. — The ground of that decision seems to have been that there had been a deviation from the voyage insured. There is no deviation here. Nor any plea to raise the defence of deviation, if there had been.]

Here there was nothing done under the charter-party so as to make the freight an inchoate interest; it was nothing more than a contingent interest. In all the cases already cited, or which can be found bearing on the subject, the shipowner was bound by the charter-party to start at once for the port of loading. Thus, in *Thompson v. Taylor*, 6 T. R. 478 (3 R. R. 233), there was an express stipulation in the charter that the ship should directly proceed from the Thames to Teneriffe, the port of loading; and

she did so sail, and was captured before reaching Teneriffe, and it was held that the interest in the freight had commenced; but Lord KENYON, Ch. J., put it expressly on the ground that something had been done under the charter. He says (6 T. R., at p. 481): "The property against the loss of which the assured wishes to be indemnified is that which he had a right to receive under the charter-party; and it seems now admitted that if the contract had its inception, if anything were done under it by the plaintiff who let his ship to hire, his right to freight commenced. That depends on the words of the charter-party, which are, 'that the ship should on or before the 9th of February depart out of the river Thames, and directly proceed to Port Orotava in Teneriffe, &c., load there, and then sail and proceed to Barbadoes.' Now, it seems to me that the argument on behalf of the plaintiff is well founded, that this was an inception of this contract by the owner of the ship; for the ship did sail from the Thames towards Teneriffe, and was captured in the course of that voyage."

[BLACKBURN, J. — Lord KENYON says, in effect, the owner being bound to sail at once under the terms of the charter, and having done so, that is enough; but he does not say, that if the vessel had sailed with the intention of performing the charter-party, though not bound to do so, that would not have been sufficient.]

Again, in *Everth v. Smith*, 2 M. & S. 278, 284 (15 R. R. 246), Lord ELLENBOROUGH, Ch. J., says: "This was an insurance on freight generally, not on any specific freight; the charter-party is only material to show that upon the *ship's arrival [* 66] at Riga there was an inchoation of the risk." So here there could be no inchoate interest in the chartered freight until the ship reached Howland's Island.

[COCKBURN, Ch. J. — How can a shipowner, when he has got a charter like this, by which he is to send his ship from A. to B., and there take a cargo for C., insure the risk of losing the chartered freight while the ship is going from A. to B. otherwise than in the way the plaintiff has done?]

The plaintiff might have insured on a voyage from Bombay to Howland's Island and thence to England, the risk being on chartered freight from Howland's Island to England; as was done in *Potter v. Rankin*, L. R. 3 C. P. 562.

[COCKBURN, Ch. J. — That, the shipowner says, is what he has done in effect.

BLACKBURN, J. — Although the policy is worded so as to cover something else.]

The policy is in general terms, and will cover any freight obtained; and it appears that other freight was earned, and so the plaintiff cannot recover for loss of freight. *Everth v. Smith*, 2 M. & S. 278 (15 R. R. 246); *Benson v. Chapman*, 2 H. L. C. 696, 8 C. B. 950. In *Barclay v. Stirling*, 5 M. & S. 6 (17 R. R. 245), the underwriters were allowed to set off the freight earned.

[COCKBURN, Ch. J. — In those cases the freight was earned on the same voyage. That was not so here.

BLACKBURN, J. — If the ship is not totally destroyed, and is afterwards repaired, and earns freight on a different voyage, that can be no answer to a claim for loss of freight on a particular voyage. Moreover, as to setting off the freight earned, if any were earned, there is no plea enabling the defendant to take advantage of it.]

Here there was an election to repair, and after that the owners cannot claim for a constructive total loss by means of a subsequent notice of abandonment. *Benson v. Chapman*.

[Counsel also contended that, on the facts, the shipowner had voluntarily abandoned the voyage; and on this they cited [*67] the *judgment in *Potter v. Rankin*, L. R. 3 C. P., at pp. 567-568; but the Court intimated that if the defendant's counsel had intended to rely on this point they ought to have insisted on the question going to the jury.]

COCKBURN, Ch. J. — I am of opinion that this rule must be discharged. The first question is, whether the insured can recover upon this policy for freight to be earned under a charter-party, by which the ship was to go from Bombay to Howland's Island, there take a cargo, and bring that cargo from Howland's Island to England; the facts being that the vessel, having started from Bombay upon the voyage, had been prevented by perils of the sea from ever reaching Howland's Island. I have no hesitation whatever in saying that, in my opinion, the insured can recover upon this policy. The authority referred to by my Brother BLACKBURN, from Phillips on Insurance, § 335, is directly in point; and I think, independently of authority, on principle, it is clear that a party can recover upon a policy adapted to such a voyage. From the moment that a vessel is chartered to go from port A. to port B., and at port B. to take a cargo and bring home that cargo to

England, or to take it to any port, which I will call port C., for freight, the shipowner, having got such a contract, has an interest unquestionably in earning the freight secured to him by the charter; and having such an interest, it is manifest that that interest is insurable; and he loses the freight and benefit of his charter just as much by the ship being disabled on her voyage to the port at which the cargo is to be loaded and from which it is to be brought, as he would lose it by the disaster arising from the perils insured against between the port of loading and the port of discharge. It is therefore an appreciable, tangible interest, and I entertain no doubt it is an interest that can be insured.

It is a fallacy to say the freight is earned simply by bringing the cargo from the port of loading to the port of discharge; the freight is earned by the whole voyage which it is necessary to make to fetch the cargo and bring it home. The shipowner who sends his ship empty upon the voyage, and who, did not the freight cover the whole expenditure, would get no return for it, takes care to get freight commensurate with the expense and risk of the ship going *to the port of loading as well as coming [*68] home from thence with cargo.

The only question here is, as it seems to me, whether, under the particular circumstances and terms of this charter-party, the policy would apply. Our attention has been called to the fact that by the terms of the charter-party the shipowner was at liberty, after his vessel left Bombay, to go upon other voyages with other cargoes to other ports, before he came to Howland's Island, which was the port at which he was to load the particular cargo to which this charter refers; it being only stipulated that his vessel should be at Howland's Island on or before a given date. It may be that, if the ship had gone on some other voyage antecedently to her going to Howland's Island, that would have been, within the terms of the present policy, such a deviation as would have avoided the policy, so far, at all events, as relates to any disaster happening to the ship before her arrival at Howland's Island. But here the policy being upon freight to be earned by a voyage from Bombay to Howland's Island, and from Howland's Island to England, we may take it that the shipowner had in view the voyage which the vessel actually entered upon, and was intended to make, although he may have been at liberty, under the conditions of the charter-party, to go on some other voyage before. The

destination of his ship was Howland's Island. It is plain that the plaintiff, on the facts of the case, never intended, on getting this policy made, to avail himself of the liberty which the charter-party left to him in that respect, but contemplated simply a voyage from Bombay to Howland's Island, and from Howland's Island, after taking in the cargo, to this country, and that is the voyage to which the policy is immediately applicable. Although the plaintiff was at liberty by the charter-party to go to other places, and if he had gone to other places it might possibly have been that this policy would thereby have been vitiated by reason of the deviation, I do not think that that argument can prevail, when we find that the policy is in terms applicable to such a voyage as actually was entered upon.

Mr. Milward also pointed out that, according to the terms of the policy, the risk would attach upon a cargo between Bombay and Howland's Island, that there was nothing to prevent [* 69] the plaintiff *from carrying cargo from Bombay to Howland's Island, and the policy would attach just as much as upon the freight relating to the cargo to be carried from Howland's Island to England. This amounts to saying that the terms of the policy are large enough to embrace what was not in the contemplation of the parties, because it is clear that all that was intended by this policy was to secure the freight on the cargo to be carried from Howland's Island; but it is not necessary for us to consider what would have been the effect of the policy if it had been sought to apply it to freight between Bombay and Howland's Island. It may have been framed in larger terms than were necessary with reference to what was the real intention of the parties, but it does not follow from that that it is not quite sufficient as regards that which was really intended. I, therefore, do not think there is anything in that point.

But then it is said, and that brings us to the second part of the case, that, even assuming that this policy would be sufficiently operative to protect the assured in respect of loss of their freight by reason of the ship not being able to get to Howland's Island to take this cargo, yet he is not entitled to have the advantage of the insurance, because it was his own fault that the vessel did not get to Howland's Island; in other words, that the failure to get to Howland's Island was not in consequence of the perils insured against, because the partial damage the vessel sustained could

have been remedied. As has been thrown out in the course of the argument, this was a question eminently for the jury, and one which it does not appear that the parties submitted to my Brother HANNEN as one he should withdraw from the jury, and refer to the Court; and it is quite clear my learned Brother had no such notion in his mind, and no such intention in reserving leave; and therefore, if there really were any question in the matter, I, for one, should protest against being called upon to decide it, and I should think it necessary to send the case for a new trial. But I must say, if we were called upon to decide upon the facts, it would be impossible for us to decide in favour of the defendant; and if we were to send the case for a new trial, the jury could only come to one conclusion upon the facts. The vessel is stranded and on shore at New Zealand; the captain is destitute of any means to repair *her. He applies to a person to [*70] advance money on bottomry. The money is advanced, not for the purpose of enabling the vessel to go and take a cargo from Howland's Island, but to take a timber cargo, which everybody knows requires a differently constituted vessel, to England. In the meanwhile notice is given to the underwriters on ship, by the owners, who declined themselves to do anything more in the way of repairing; and when the agent of the underwriters goes out and sees the state in which the vessel is, notwithstanding the repair which she has undergone, he says: "It is not worth while to repair this vessel and put her in such a state as that she shall be fit to go to Howland's Island and then to England, and you had better abandon her to the holder of the bottomry bond." On those facts, if a jury were called upon to determine whether there was a constructive total loss *quoad* this voyage to Howland's Island and thence to England, can any one hesitate in thinking a jury would find in the affirmative? Therefore, supposing it was a question for us to determine, we should determine it in favour of the plaintiff; and if we did not determine it ourselves, but left it to a jury, there could be but one result. I think, therefore, more especially as it was not a part of the reservation on which the rule was intended to be granted, that on this point our judgment should be for the plaintiff; and that upon the whole the rule should be discharged.

BLACKBURN, J. — I am of the same opinion. I think, as soon as the case is understood, it is very clear. It appears there is a

policy of insurance made upon a voyage "from Bombay to Howland's Island, and from thence to England." That is the description of the voyage. The nature of the thing insured is "freight chartered or otherwise." So that upon the face of the policy there is a bargain between the insured and the underwriters, by which if, during that voyage, by one of the perils insured against, freight is lost, the underwriters should pay. We have, therefore, to see whether there was freight lost during the voyage, which involves the question whether this chartered freight had come into existence at the time the accident happened which caused the alleged loss; whether, at that time, the interest had commenced. When

there is an insurance upon freight, so long as the matter [*71] remains merely contingent, *so long as the shipowners

have only a good hope of getting freight, no freight is in existence; and if the ship is lost, there would be no loss of freight, inasmuch as the freight had never come into existence, and all that the shipowners have lost is the hope of earning the freight. But, on the other hand, the law seems perfectly settled by a variety of cases, as I find it laid down by Mr. Phillips, in his book on Insurance, at § 328, where he says: "In regard to the commencement of this interest [in freight], it is a general rule that it commences, not only by the vessel sailing with the cargo on board, but also when the owner or hirer, having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses and taken steps towards earning the freight." I think that is the accurate rule. When a shipowner has got a contract with another person under which he will earn freight, and has taken steps and incurred expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which, if afterwards destroyed by one of the perils insured against, is lost, and ought to be paid for by the underwriters. Mr. Phillips a little further on, in § 335, states a proposition, which would seem exactly applicable to the present case, as I understand it. He says: "A vessel being chartered from A. to B., the interest in the freight commences under the charter-party on the vessel sailing for A., either in ballast or with a small quantity only of goods for B." And then he explains that proposition: "That is, if the prior passage is merely preliminary to the one for which the vessel is chartered, having no cargo deliverable at A. or any intermediate

No. 51. — *Barber v. Fleming*, L. R. 5 Q. B. 71, 72.

port, and the object in the passage to A. is merely to prosecute the voyage thence to B., the interest in the whole freight under the charter-party accrues on the commencement of the first passage." ¹ He seems to be describing this *very case; [*72] when the owners have a charter-party from the Chincha Islands to England, the ship to start from Bombay to take in that cargo, the ship having started from Bombay upon the voyage, that is a sufficient commencement of the interest. He guards himself against saying, what, it is as well to guard one's self against being supposed to say in the present case, that if the owners had been carrying freight from Bombay to Howland's Island that might not raise a different question. But the only question here is, whether or not the interest in freight had sufficiently commenced when the shipowners began this voyage for the sole purpose of fulfilling the charter-party on which they would have earned freight, had they not been prevented by the accident. Mr. Fullarton, in his argument, admitted that he could not dispute that when the owners commenced the voyage, having the charter-party, the risk would have attached, provided the charter-party had been the ordinary charter-party that we meet with in general, in which, the ship being at Bombay, the shipowners would covenant that she should with all convenient speed proceed to the Chincha Islands, and there load a cargo. He admits that, if that had been so, the cases decide that as soon as the ship sails from Bombay to the Chincha Islands the interest in the chartered freight commences. But he says, in each of the cases cited, the party was bound to sail

¹ Phillips cites the case of *Adams v. Warren Ins. Co.* (22 Pick. 163). The policy was dated the 18th of June, 1835, on the freight of the plaintiff's ship *Andes*, at and from New York to St. John's, East Florida, and thence to Charlestown, Massachusetts. The charter was, the 4th of June, 1835, of the whole of the vessel, and stipulated that she should proceed without delay from New York to the St. John's River, and there take on board a cargo of live-oak timber, to be transported to Charlestown, freight to be payable on discharge. The underwriters were not aware of the existence of this charter until after the vessel was lost. The vessel sailed in ballast from New York on the 7th of June, 1835, for the purpose of fulfilling the charter-party,

and had not since been heard of. The charterer had a cargo ready to be put on board at St. John's.

SHAW, Ch. J., delivering the judgment of the Court, said: "It appears that the assured had a contract of charter-party to carry a cargo of live oak from St. John's River, East Florida, to Charlestown, Massachusetts; that a cargo was there ready to be taken on board on the arrival of the vessel; and that the vessel sailed from New York in the execution of that contract, and was lost on the voyage. The assured had thus an inchoate right to freight, which was an insurable interest; it was lost by a peril insured against, and therefore the plaintiff has a right to recover."

at once on the voyage, for the contract was that the ship should proceed to the port of loading with all convenient speed; and, consequently, he takes the distinction in the present case, — that it is not sufficient, that you are sailing in order to carry out the charter-party, but there must be a starting on the voyage because you are required and bound to do it by the charter-party; and consequently under this particular charter-party, where, in- [*73] stead of saying the *ship at Bombay shall proceed at once to the Chincha Islands, the charter-party only requires that she shall be there by a particular day, the shipowner might make a seeking voyage on the way there; and that therefore he was not bound to go. But that is not within the spirit and reason of the rule. The spirit and reason of the rule are, that the interest commenced, not because the man acted under compulsion of the contract, but because he has acted so far under the contract as to show it is so no longer speculative, but he had actually begun to do something which makes the inchoate interest attach, and makes it a real thing; and it seems to me that as soon as the ship, although not bound to go direct from Bombay to the Chincha Islands, had begun to sail there, the interest had sufficiently attached, and consequently on that point the plaintiff is right.

Then comes the other question, whether or not the freight was lost by the perils insured against. It appears, when the vessel was on the preliminary voyage, she met with the perils of the sea, and was stranded on the coast of New Zealand, and she was found to be in such a state that to repair her and send her to the Chincha Islands in a state to earn the freight would have cost more than she was worth. There was, besides the other evidence, the evidence of the agent of the underwriters on ship, who was sent out to look after their interest, and who thought she was not repairable, and desired she should not be repaired, and when in Court, was prepared to swear that that opinion was right.

There was, therefore, evidence to go to the jury upon that question, and I do not see, as far as I can make out, there was anything to the contrary. If, then, the defendant's counsel had meant to contest this question, it ought to have gone to the jury. What took place was that a verdict was entered for the plaintiff, reserving leave to move the Court on points mentioned, and, as far as I can learn, this particular one was not reserved; and then at the end of the reservation it was added, "the Court to draw inferences

upon all points of fact." Are we to construe this as meaning that such a question was taken from the jury and to be referred to the Court? We could by no possibility decide any such point. Nor can it be supposed that the plaintiff's counsel would have consented to such a thing, nor that my Brother HANNEN would have consented *to reserve such a question of fact for the Court. [*74] In point of fact the vessel never was repaired, and therefore the point that arose in *Benson v. Chapman*, 2 H. L. C. 696, 8 C. B. 950, does not arise here; but then in the attempts to repair there was a bargain made by the person who advanced the money that he must have the further security of a charter of the vessel for a cargo of timber; and it was argued that this showed that the owners voluntarily abandoned the voyage. If that had been all that was shown to make a total loss, it might be so; but if the fact was that the ship was not within the reach of the owners, and could not have been repaired so as to have gone to the Chincha Islands, this fresh charter did not prevent there being a total loss. I come, therefore, to the conclusion that the interest had really attached; and, secondly, that the loss was a total loss, assuming always what was admitted at the trial, that the injury was such that the vessel could not practically be repaired so as to earn this freight.

HANNEN, J. — I am of the same opinion. It appears to me to be clear that this policy, to whatever else it may be applicable, included this particular freight which is the subject of this litigation. The policy may or may not apply to freight which might have been earned on the way from Bombay to Howland's Island. It may or may not apply to freight other than the chartered freight; but this particular freight is specified under the terms of the policy, inasmuch as it is chartered freight from Howland's Island to the United Kingdom. Now that being the only thing that is sought to be recovered, and if it be, as I think it is, within the terms of the policy, the only question that remains is, whether or not the thing which is the subject of insurance has been lost by the perils insured against; and that brings us to the consideration of whether or not this case comes within the rule which has been laid down in the cases that have been referred to, as to what is such a bringing into existence of the thing which is to be the subject of insurance as to make the liability of the underwriters attach. Now it seems to me that this case comes clearly within

the rule as it is laid down in the passage referred to, by my Brother BLACKLURN, from Phillips on Insurance, and also [*75] as it has been laid down in *the English authorities. I think the rule, as stated by Lord ELLENBOROUGH in *Davidson v. Willasey*, 1 M. & S. 313, 316 (14 R. R. 438), is applicable to this case. He is dealing with a policy on the freight upon a voyage that is to consist of two parts, and he says: "The interest intended to be insured was the freight which the assured would have earned under the terms of the charter-party, if the voyage had not been stopped by the perils insured against."

Now apply that here; if the voyage, in the course of which the freight was to be earned, treating it only as a voyage from Howland's Island to the United Kingdom, could have been carried out, then the loss would not have been sustained. How was it prevented being carried out? For the purpose of this part of the case it must be taken that it was prevented from being carried out by the fact that by the perils of the sea it became impossible for the vessel to prosecute that voyage.

But it has been contended upon the facts that that is not so, and that the vessel was not prevented from prosecuting the voyage contemplated by the charter by perils insured against, but by the free will of the representative of the owners, that is, the captain, in accepting another charter-party. On this I have only to say that no such point was ever presented to my mind at the trial, and that if it had been presented to my mind I should have thought myself greatly departing from my duty, if I had left any such question as that to the Court; because that would have involved an inquiry into the physical condition of the ship when in New Zealand, a question which it is manifest the Court is not in a position to form any opinion upon. But, as it seemed to me, that question was not originally intended to be raised. It seemed only to arise incidentally in a second cross-examination by Mr. Milward; and it appeared to me to be altogether dropped, when the answers which were given appeared, and were, in effect, conclusive upon the subject. I cannot think that Mr. Milward would not have pressed that question further and insisted upon its being left to the jury, if he had not at the time, although he has forgotten it now, thought it useless to present any such question to the jury, after the evidence of the witness who represented the underwriters upon the ship.

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* For these reasons I concur with my Lord and my Brother [* 76]
BLACKBURN.

HAYES, J., fully concurred, for the reasons given by the rest of
the Court. *Rule discharged.*

ENGLISH NOTES.

In a case tried at Guildhall in 1746 the ship *Success* was insured at and from Leghorn to the port of London, and till there moored twenty-four hours in good safety. She arrived on 8th July at Fresh-Wharf and moored, but the same day was served with an order to go back to the Hope to perform a fourteen days' quarantine. On this the crew deserted her, and on the 12th the captain applied to be excused going back. The petition was adjourned to the 28th, when the Regency ordered her back, and on the 30th she went back, performed the quarantine, and then sent up for orders to air the goods. But before she returned she was burnt, on the 23rd of August. It was ruled that although the ship was at her moorings from the 8th to the 30th of July, she could not be said to be there *in good safety*, which must mean the opportunity of unloading and discharging, whereas here she was arrested within the twenty-four hours, and the hands having deserted, and the Regency taken time to consider the petition, there was no default in the master or owner. *Waples v. Eames*, 2 Str. 1243.

It will be seen that in the case of *Camden v. Cowley*, No. 54, vol. xiv., *post*, a policy on ship "at and from Jamaica" was held to attach after the ship arrived in Jamaica, although she had not completely discharged her outward cargo.

In a somewhat similar case of *Warre v. Miller* (1825), 4 B. & C. 538, and see 9 R. C. 377, it appears to have been admitted that the policy attached, the only question being whether there was a deviation.

Where the shipowner insures his interest in the profit of conveying his own goods, which he may do, according to the law as established in *Flint v. Flemyng*, *supra*, under the name of "freight," the facts that he has purchased the goods by a contract made with a view to their being placed on board, and that the goods were in readiness to be put on board on the arrival of the vessel, are sufficient to cause the risk to commence and the policy to attach, — just as a binding contract of affreightment would have had this effect in the case of an insurance of "freight" in the strict sense of the term. *Deraux v. J'Anson* (1839), 5 Bing. N. C. 519.

The case of *Rankin v. Potter* (H. L. 1873, appeal from *Potter v. Rankin*), set forth at length in 1 R. C. 70 *et seq.*, is an instructive case upon the meaning and effect of a policy on "homeward chartered freight."

Where a ship is chartered for a voyage, and an insurance is effected on freight for the voyage as described in the charter-party, the policy attaches as soon as the ship begins the voyage. *Thompson v. Taylor* (1795), 6 T. R. 478, 3 R. R. 233. This was followed in the Exchequer Chamber in *Foley v. United Fire and Marine Insurance Co. of Sydney* (1870), L. R. 5 C. P. 155, 39 L. J. C. P. 206, where the insurance was of chartered freight on ship *G.*, "at and from Mauritius to the rice ports, and thence to port or ports of call and discharge in the United Kingdom." The ship had been chartered to proceed from Calcutta to Mauritius, where she was to unload her cargo, and to proceed thence to Rangoon, or another rice port, and then to proceed with a cargo of rice, to be discharged at a port or ports in the United Kingdom. The ship arrived safely at the Mauritius, but while she was there, and before she had finished discharging her cargo, she was driven ashore and wrecked. It was held that the policy on the chartered freight had attached.

If, however, the ship, although at the place where the risk is to commence, breaks ground for a voyage different from the voyage described in the policy, it seems that the policy does not attach. *Sellar v. McVicar* (1804), 1 Bos. & P. (N. R.) 23, 8 R. R. 744.

Where a payment is made "in advance of freight," this is understood to be an unconditional payment, and is no longer at the risk of the shipowner; so that, if an insurance has been effected on the interest of the shipowner on freight valued at a sum representing the whole freight, the advanced freight must be deducted from the valuation to ascertain the amount at risk which may be recovered by the shipowner under such a policy. But this payment in advance, representing as it does a portion of the expected profit to be made by the freighter upon the safe carriage of the goods, may be insured as freighter's interest under the name of "freight advanced," and the freighter may recover under such a policy accordingly. *De Silvale v. Kendall* (1815), 4 M. & S. 37, 16 R. R. 373; *Saunders v. Drew* (1832), 3 B. & Ad. 445; *Ellis v. Lafont* (Ex. Ch. 1853), 8 Ex. 546, 22 L. J. Ex. 124; *Hicks v. Shield* (1857), 7 E. & B. 633, 26 L. J. Q. B. 205; *Byrne v. Schiller* (1870), L. R. 6 Ex. 20, 40 L. J. Ex. 40, 23 L. T. 741, 19 W. R. 161 (affirmed L. R. 6 Ex. 319, 40 L. J. Ex. 177, 25 L. T. 211, 19 W. R. 1114); *Rodocanachi v. Milburn* (C. A. 1886), 18 Q. B. D. 67, 56 L. J. Q. B. 202, 56 L. T. 594, 35 W. R. 241; *Dufourcet v. Bishop* (1886), 18 Q. B. D. 373, 56 L. J. Q. B. 497, 56 L. T. 633. Compare *Manfield v. Maitland* (1821), 4 B. & Ald. 582, 23 R. R. 402. Some of these cases and others are cited and commented on in *Allison v. Bristol Marine Insurance Co.* (H. L. 1875), 1 App. Cas. 209, 34 L. T. 809, 24 W. R. 1039, where freight was to be paid half in cash on signing bills of lading, and the

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remainder on right delivery of the cargo. The shipowner insured freight payable abroad, valued at £2000, which was the sum expected to be received abroad on delivery of the full cargo. In the event about half of the cargo was lost on the voyage. The shipowner, being satisfied that the freighter had nothing more to pay, claimed a total loss from the insurers. It was held that his construction of the charter-party was right, and that he was entitled to recover from the insurers accordingly.

In *Manfield v. Maitland* (1824), 4 B. & Ald. 582, 23 R. R. 402, the contract of affreightment was that one-half of the freight was to be paid in cash on unloading and delivery, and the remainder by bill in London at four months' date, and there was a stipulation that the captain was "to be supplied with cash for the ship's use." In pursuance of this stipulation, the master drew a bill on the freighters, which was duly accepted and paid. The freighters effected an insurance "on a bill of exchange," &c., describing the above-mentioned bill. It was held that the payment was not an advance of freight, and that the freighters had *no insurable interest*. But as the freighters practically had the advance secured upon the freight, out of which they might have deducted the advance, it is difficult to see why they might not have insured their security by a proper description of the subject at risk.

It is at all events clear that, if advances are made by the freighter to the shipowner, for which the freight is expressly pledged by way of security, the freighter has an insurable interest in the freight to the extent of the advances, and he may insure that interest under the name of "advance on account of freight." The pledge is in effect an equitable assignment of the freight. *Wilson v. Martin* (1856), 11 Ex. 684, 25 L. J. Ex. 217. And in the like case the shipowner to whom the advances are made, and who will have to repay them in case of the non-delivery of the cargo, has also an insurable interest, and may insure his interest under the description of "money advanced on account of freight." *Hall v. Janson* (1855), 4 El. & Bl. 500, 24 L. J. Q. B. 97.

AMERICAN NOTES.

Flint v. Flemyng is cited in 1 Parsons on Marine Insurance, p. 166, as giving "a very good definition" of *freight*, as "the benefit derived by the shipowner from the employment of his ship." He prefers this definition by Lord TENTERDEN to that by Lord ELLENBOROUGH in *Forbes v. Aspinall*. He sums up the doctrine of the authorities, English and American, as follows: "A ship is going in ballast to a port where the shipowner owns goods which she shall there take on board and carry to another port; or he does not own the goods yet, but has contracted to purchase them, and has prepared to pay for them, and the goods are ready to be delivered to him or to be put on

board; or a shipper at that port has the goods and has contracted with the owner to put them on board; or a charterer has contracted with the owner to take the ship at that port and thereafter pay for the use of her;—in either of these cases we have no doubt the owner has an insurable interest in freight. This he would have, although the charterer had no goods at the port to put on board the vessel, and it were proved that he could get no goods there, for he would still be bound to pay, as for dead freight, for whatever part of the vessel he had hired and could not fill. And if a shipper has contracted with the owner to ship goods at that port if the vessel reaches it, we should say that the owner has an insurable interest in the freight of these goods as soon as the ship sails for that port, although the shipper had neither bought them nor contracted for them. It would be enough if the ship-owner had contracted with some one to be a shipper, and his ship was going to that port to receive the goods under the contract."

The American authorities have been anticipated in the last note. In *Adams v. Warren Ins. Co.*, 22 Pickering (Mass.), 133, SHAW, Ch. J., said: "It appears that the assured had a contract of charter-party to carry a cargo of live-stock from St. John's River, Florida, to Charlestown, Mass.; that a cargo was there ready to be taken on board on arrival of the vessel; and that the vessel sailed from New York in the execution of the contract, and was lost on the voyage. The assured had thus an inchoate right to freight, which was an insurable interest; it was lost by a peril insured against, and therefore the plaintiff has a right to recover." Citing *Flint v. Flemyng*, which is also cited and followed in *Wolcott v. Eagle Ins. Co.*, 4 Pickering, 435, as follows: "And it is not a sound objection that the insured were the owners of the ship, as well as of the property laden on board. They may insure the safe transportation of their own property in their own ship under the name of freight, just as well as if their ship were employed by them to carry the goods or property of others. In the latter case they are to receive a reward for the transportation, in the former their compensation arises from the increased value of their property carried in their ship to the destined port of discharge. And any one who has an interest in the safe transportation may insure it in the name of freight. The word, in an enlarged sense, may mean the sum to be paid for carrying any property, animate or inanimate, on ship-board, from one port or place to another."

Flint v. Flemyng is also cited in *Clark v. Ocean Ins. Co.*, 16 Pickering, 296 the case of a charterer procuring insurance.

NOTES

ON

ENGLISH RULING CASES

CASES IN 13 E. R. C.

13 E. R. C. 1, BECKFORD v. TOBIN, 1 Ves. Sr. 308.

Implied intention to give interest on legacy from date of death of testator.

Cited in *Hill v. Hill*, 3 Ves. & B. 183, 13 Revised Rep. 175, 13 E. R. C. 6, holding that interest from the testator's death upon legacies to his grand children, would be allowed by implication.

—Interest on infant's legacy.

Cited in *Flinn v. Flinn*, 4 Del. Ch. 44; *Loring v. Woodward*, 41 N. H. 391; *Cooke v. Meeker*, 36 N. Y. 15, 34 How. Pr. 115,—holding that a legacy to an infant carried interest from the testator's death; *Van Bramer v. Hoffman*, 2 Johns. Cas. 200, 1 Am. Dec. 162, holding that a legacy payable to a child at a certain time carries interest from the testator's death, but otherwise where legacy is to grandchild; *Seibert's Appeal*, 19 Pa. 49, holding that the interest of an infant under a gift by a parent or one in loco parentis runs from the death of the testator; *Golding v. Eyre*, 2 Browne (Pa.) 89 Appx., holding that a child's interest commences from the death of the father, the testator, where no provision is made for its support; *Earp's Will*, 1 Pars. Sel. Eq. Cas. 453, on the interest of the widow and children as commencing at the testator's death.

Cited in 1 *Beach, Trusts*, 839, as to when maintenance of infant will not be directed by the courts.

Distinguished in *Drayton v. Grimke*, Rich. Eq. Cas. 321, 24 Am. Dec. 419, holding that where the infants were not children for whom the testator was bound to provide and other circumstances are such that the interest is not needed for support, the interest is not from the testator's death; *Lowndes v. Lowndes*, 15 Ves. Jr. 301, holding that a legacy to a natural child does not carry interest from the testator's death; *Raven v. Waite*, 1 Swanst. 553, 1 Wils. Ch. 204, holding that a bequest to an adult legatee did not carry interest until after one year from the testator's death.

—Legacy by one in loco parentis.

Cited in *Brinkerhoff v. Merselis*, 24 N. J. L. 680, holding that a legacy by one in loco parentis to a minor child, payable at some future date, if no provision he made for support the child carries interest from the testator's death; *Corbin v. Wilson*, 2 Ashm. (Pa.) 179, holding that where the legacy is given

by one in loco parentis, the interest of the child dates from the death of the testator.

—Where legacy is contingent.

Cited in *Re Richards*, L. R. 8 Eq. 119, on a contingent legacy to infant by parent as carrying interest from testator's death; *Re Bowlby* [1904] 2 Ch. 685, 73 L. J. Ch. N. S. 810, 91 L. T. N. S. 574, 53 Week. Rep. 270, holding that an infant child is entitled to his support out of the interest on his legacy given him by his parent, though it is contingent.

Interest on general legacy.

Cited in *Sullivan v. Winthrop*, 1 Sumn. 1, Fed. Cas. No. 13,600, holding that interest commences on a pecuniary legacy at the end of one year from the testator's death, but otherwise in case of infants; *Graybill v. Warren*, 4 Ga. 528, on the liability of the administrator for interest on a legacy; *Re Gibson*, 24 Abb. N. C. 45, 8 N. Y. Supp. 348, 2 Connolly, 123, holding that the interest on general legacies runs from one year after the death of the testator; *Re Logan*, 4 Manitoba L. Rep. 49, holding that the widow is entitled to interest from the expiration of one year after the testator's death; *Slater v. Slater*, 3 Ch. Chamb. Rep. (U. C.) 1, holding that a suit by a legatee against an administrator for a share of the estate cannot be brought within one year after the death of the intestate.

Distinguished in *Steiner's Estate*, 13 Phila. 358, 37 Phila. Leg. Int. 222, holding that the interest on a general legacy does under the rules of Pennsylvania begin before the expiration of one year from testator's death.

Rate of interest.

Cited in *Welch v. Adams*, 152 Mass. 74, 9 L.R.A. 244, 25 N. E. 34, holding that the interest on a legacy is to be computed at the legal rate, without regard to the rate realized.

Interest as incident to principal.

Cited in *Obernmyer v. Nichols*, 6 Binn. 159, 6 Am. Dec. 439, on interest as following the principal.

Construction of will according to the intention of the testator.

Cited in *Klohs' Estate*, 2 Woodw. Dec. 225, on the construction of a will according to the manifest intention of the testator.

Presumption of advancement where conveyance is made by one in loco parentis.

Cited in 1 *Beach, Trusts*, 353, on presumption of advancement from conveyance by one in loco parentis.

13 E. R. C. 6, *HILL v. HILL*, 13 Revised Rep. 175, 3 Ves. & B. 183.

Legacy to infant child as carrying interest from testator's death.

Cited in *Flinn v. Flinn*, 4 Del. Ch. 44, holding that a legacy to the testator's child carries interest from the testator's death, for their support and education; *Graybill v. Warren*, 4 Ga. 528, to the point that if testator is parent of infant legatee, legacy bears interest from death of testator; *Brown v. Knapp*, 17 Hun, 160, holding that legacy to infant child of testator draws interest from date of testator's death; *Sullivan v. Winthrop*, 1 Sumn. 1, Fed. Cas. No. 13,600, holding same even though the child be an adopted one; *Re Lynch*, 52 How. Pr. 367, 2 Redf. 434, holding that where a sum is left in trust, with direction that interest and income be applied to the use of a person, such person is entitled to interest from death of testator

Cited in 2 Thomas, Estates, 1518, 1520, 1523, 1525, as to when interest on legacies begins; 1 Beach, Trusts, 839, as to when maintenance of infant will not be directed by the courts.

—By one in loco parentis.

Cited in *Brown v. Knapp*, 79 N. Y. 136 (reversing 17 Hun, 160); *Seibert's Appeal*, 19 Pa. 49; *Corbin v. Wilson*, 2 Ashm. (Pa.) 178,—holding a legacy to an infant by one in loco parentis to him carries interest from the death of the testator, for the child's support.

Presumed intention to provide for maintenance.

Cited in *Cooke v. Meeker*, 36 N. Y. 15, 34 How. Pr. 115, holding that where such is the apparent intention of the testator, a legacy to a child will carry interest from the testator's death.

Distinguished in *Lyon v. Industrial School Asso.* 127 N. Y. 402, 28 N. E. 17, holding that where the intention of the testator is shown to be that he did not intend the interest for support, it will not be paid till legacy becomes due; *Drayton v. Grimke*, Rich. Eq. Cas. 321, 24 Am. Dec. 419, holding that where the testator was not bound to provide for the legatees, there was no presumption that interest was intended for maintenance.

Presumption of advancement where conveyance made by one in loco parentis.

Cited in 1 Beach, Trusts, 353, on presumption of advancement from conveyance by one in loco parentis.

13 E. R. C. 12, *BATHURST v. MURRAY*, 6 Revised Rep. 230, 8 Ves. Jr. 74.

Jurisdiction of court of equity to compel a settlement in favor of its ward.

Cited in *Chambers v. Perry*, 17 Ala. 726; *Foote v. Cobb*, 18 Ala. 585, on the jurisdiction of a court of equity to compel the husband of a ward of a chancery court to make a satisfactory settlement in her favor.

13 E. R. C. 16, *RE LEIGH*, L. R. 40 Ch. Div. 290, 58 L. J. Ch. N. S. 306, 60 L. T. N. S. 404, 37 Week. Rep. 241.

13 E. R. C. 24, *REX v. DE MANNEVILLE*, 5 East, 221, 7 Revised Rep. 693, 1 Smith, 358.

Right of father to custody of his infant child.

Cited in *Wadleigh v. Newhall*, 136 Fed. 941; *United States v. Bainbridge*, 1 Mason, 71, Fed. Cas. No. 14,497; *Dumain v. Gwynne*, 10 Allen, 270; *Com. ex rel. Potter v. Potter*, 3 Luzerne Leg. Reg. 209; *Foster v. Alston*, 6 How. (Miss.) 406,—on the right of the father to the custody of an infant child; *Bow v. Nottingham*, 1 N. H. 260, on the custody of an infant's person; *Sloan v. Jones*, 130 Ga. 836, 62 S. E. 21, holding that prima facie the right of custody of an infant is in the father; *Re Mitchell*, R. M. Charl. (Ga.) 489, holding that the father has the legal right to the custody of his children subject to the control of the courts; *Hunt v. Hunt*, 4 G. Greene, 216, holding that the father has the right to the custody of an infant child, if the child is of such age that it may be withdrawn from the mother's care; *Re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768, holding that the father is entitled to the custody of his infant child, unless the child's welfare demands otherwise; *State ex rel. Mayne v. Baldwin*, 5 N. J. Eq. 454, 45 Am. Dec. 399; *State v. Stigall*, 22 N. J. L. 286,—holding that the father of a legitimate child is entitled to the custody of the

child; *Falls v. Belknap*, 1 Johns. 486, as to whether a putative father is entitled to the custody of his illegitimate child; *Townsend v. Babcock*, 18 Wend. 637, holding that the father is entitled to the custody of his infant children unless he forfeits this right by misconduct or other circumstances warrant the court in giving them to the mother; *People ex rel. Nickerson v. —*, 19 Wend. 16, holding that at common law the father was entitled to the custody of infant children but this has been slightly modified by statute; *People ex rel. Olmstead v. Randell*, 27 Barb. 9, holding that the father has the right to the custody of child except for good cause shown, or in some cases where the child's welfare would be better promoted by being with the mother; *Rust v. Vanvacter*, 9 W. Va. 600, holding that the father is entitled to the custody of an infant child unless good grounds are shown to make it otherwise; *Mercein v. People*, 25 Wend. 64, 35 Am. Dec. 653; *Com. ex rel. Jordan v. Bigelow*, 1 Legal Chron. 291, 1 Foster 267; *Ex parte Schumpert*, 6 Rich. L. 344; *Re Soy King*, 7 B. C. 291,—on the right of the father to the custody of the child; *Re Coram*, 25 N. B. 404, holding that even though the child had been supported and educated for fifteen years by her uncle and aunt at the father's request without his aid, he was entitled to custody of her upon demand; *Re Brandon*, 7 Ont. Pr. Rep. 347, holding that putative father of illegitimate child, mother being dead, is *prima facie* entitled to its custody as against maternal grandfather; *Reg. v. Sheriff*, 6 U. C. Q. B. 197, holding that father has *prima facie* right to custody of child; *Re Allen*, 31 U. C. Q. B. 458, on the right of the father to the custody of infant child regardless of its age.

Cited in notes in 41 L.R.A.(N.S.) 565, 575, on denial of custody of child to parent for its well-being; 58 L.R.A. 938, on right to remove incompetent or infant from state.

Distinguished in *United States v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256, holding that the court is not bound in all events to deliver the child to the father.

Disapproved in *Com. ex rel. Hart v. Hart*, 14 Phila. 352, 37 Phila. Leg. Int. 72, 8 W. N. C. 156; *Gishwiler v. Dodez*, 4 Ohio St. 615, holding that the welfare of the child should be the guide in determining who is entitled to the custody of the child.

—Loss of right by misconduct or otherwise.

Cited in *Prime v. Foote*, 63 N. H. 52, holding that a father may lose his right to the custody of the child by misconduct or unfitness; *Com. v. Nutt*, 1 Browne (Pa.) 143, holding that where the father and mother are both of immoral character the court may give the custody of the child to a third person; *Queen v. Baxter*, 2 U. C. Q. B. 370, holding that where the mother was of good habits, and the father intemperate and violent, a court would give the custody of the child to the mother.

Habeas corpus to determine custody of infant child.

Cited in *Re Barry*, 136 U. S. 603, 34 L. ed. 500, 10 Sup. Ct. Rep. 850; *New York Foundling Hospital v. Gatti*, 203 U. S. 429, 51 L. ed. 254, 27 Sup. Ct. Rep. 53,—on habeas corpus to determine the custody of an infant; *Re Barry*, 42 Fed. 113, holding that habeas corpus will issue to determine the right to the custody of an infant as between the parents; *State ex rel. Lasserre v. Michel*, 105 La. 741, 54 L.R.A. 927, 30 So. 122, holding that habeas corpus will lie in favor of the husband against the wife to obtain the custody of the child; *Reg. v. Armstrong*, 1 Ont. Pr. Rep. 6, holding that habeas corpus for

purpose of restoring illegitimate child to mother will not issue where child is in putative father's custody under agreement.

Cited in note in 12 E. R. C. 493, on power to issue writ of habeas corpus.

Interference of courts in behalf of children's welfare.

Cited in *Jones v. Stockett*, 2 Bland, Ch. 409, holding that a court of equity may interfere against parental authority over children where it is best for the children's welfare; *People ex rel. Tappan v. Porter*, 1 Duer, 709, holding that supreme court has exclusive right to determine all questions relating to custody of children, except where such question arises in action for divorce.

13 E. R. C. 26, *REG. v. NASH*, 52 L. J. Q. B. N. S. 442, 48 L. T. N. S. 447, L. R. 10 Q. B. Div. 454, 31 Week. Rep. 420.

Right of mother to custody of illegitimate child.

Cited with special approval in *Barnardo v. McHugh* [1891] A. C. 388, 61 L. J. Q. B. N. S. 721, 65 L. T. N. S. 423, 40 Week. Rep. 97, 55 J. P. 628 (affirming [1891] 1 Q. B. 194), holding that a court in determining the right to the custody of an illegitimate child would consider the wishes of the mother and give them effect in proper cases.

Cited in *Marshall v. Reams*, 32 Fla. 499, 37 Am. St. Rep. 118, 14 So. 95, holding that mother has superior legal right to custody and control of minor illegitimate children, and can transfer such right and custody to another; *Purinton v. Jamrock*, 195 Mass. 187, 18 L.R.A.(N.S.) 926, 80 N. E. 802, holding that state may properly dispense with mother's consent to adoption of her child, when it was taken from her because of her misconduct; *Hesselman v. Haas*, 71 N. J. Eq. 689, 64 Atl. 165, holding that as against any person but the putative father, the mother of a natural child is entitled to its custody; *O'Rourke v. Campbell*, 13 Ont. Rep. 563, holding that father of illegitimate child has right to custody and care thereof, except as against mother; *Re Slater*, 14 Manitoba L. Rep. 523, holding that habeas corpus for purpose of restoring illegitimate child to mother may be refused where child is in putative father's custody under agreement; *Re C.*, 25 Ont. L. Rep. 218, holding that the mother of an illegitimate child is ordinarily entitled to its custody as against the putative father; *Re Ullee*, 53 L. T. N. S. 711, holding that the mother of illegitimate children was entitled to custody of them until they became seven years of age, and after that age the court would determine to whom they should go.

Cited in note in 65 L.R.A. 693, 695, on right of mother or reputed father to custody or control of illegitimate.

Right of foster parents to custody of adopted child.

Cited in *Re Quai Shing*, 6 B. C. 86 (dissenting opinion), on the right of foster parents to the custody of an adopted child.

13 E. R. C. 30, *RE AGAR-ELLIS*, L. R. 24 Ch. Div. 317, 53 L. J. Ch. N. S. 10, 50 L. T. N. S. 161, 32 Week. Rep. 1, earlier decision by the same court reported in L. R. 10 Ch. Div. 49, 48 L. J. Ch. N. S. 1, 39 L. T. N. S. 380, 27 Week. Rep. 117.

Right of father to custody of his infant child.

Cited in *Re Foulds*, 9 Manitoba L. Rep. 23, holding that prima facie the right to the custody of an infant child is in the father; *Re Marshall*, 33 N. S. 104, holding that father has prima facie right to custody and control of his infant children, and unless he forfeits right court cannot interfere; *Re New-*

ton [1896] 1 Ch. 740, 73 L. T. N. S. 692, 65 L. J. Ch. N. S. 641, 44 Week. Rep. 470, holding that the father was entitled to the custody of his infant children except where he had forfeited the right by misconduct, intemperance, etc.

Cited in notes in 41 L.R.A.(N.S.) 610, on denial of custody of child to parent for its well-being; 58 L.R.A. 937, 938, on right to remove incompetent or infant from state; 27 L.R.A. 56, on validity of contract for transfer of parental responsibility or authority, 13 E. R. C. 29, on right to custody of children.

Distinguished in *Re Young*, 29 Ont. Rep. 665, holding that under provincial law the maternal right to the custody of the child is recognized as well as that of the father.

The earlier opinion of the court was cited in *Markwell v. Pereles*, 95 Wis. 406, 69 N. W. 798, holding that the father is entitled to the custody of infant children unless it is shown that he is unsuitable to do so; *R. v. Blythe*, 4 B. C. 276, on the right of the father to the custody of his child; *Re Faulds*, 12 Ont. L. Rep. 245, holding that the paternal right to the custody of the child was supreme, unless for good cause shown, the welfare of the child demands otherwise; specially referred to in *Re Mathieu*, 29 Ont. Rep. 546, holding that the father is entitled to the custody of his child unless he forfeits it by some misconduct or other sufficient cause.

— To direct education.

Cited in *Re Scanlon*, L. R. 40 Ch. Div. 200, 57 L. J. Ch. N. S. 718, 59 L. T. N. S. 599, 36 Week. Rep. 842, holding that the right to direct the religious education of a child is in the father, and his wishes will be followed after his death unless the child's welfare demands otherwise.

The earlier decision of the court was cited in *Re Marshall*, 33 N. S. 104, on the right of the father to the custody of his child and to direct his religious education; *Clarke v. Darraugh*, 5 Ont. Rep. 140, holding that the right to the custody of a child and to direct its education, was in the father; *Re Agar-Ellis*, 53 L. J. Ch. N. S. 10, L. R. 24 Ch. Div. 317, 50 L. T. N. S. 161, 32 Week. Rep. 1, 13 Eng. Rul. Cas 30, on the right of the father to direct the education and upbringing of his infant child.

— Age of discretion for infant to make choice of custody.

Cited in *Re Cunningham*, 61 N. J. Eq. 454, 48 Atl. 391, holding that the age of sixteen years is the age of discretion in case of a girl to make her choice as to whom she will go.

Jurisdiction of court of chancery over control of infant child.

Cited in *Dixon v. Dixon*, 72 N. J. Eq. 588, 66 Atl. 597, holding that the court has jurisdiction of the court to order that the children be kept within the state; *Pope v. Carrol*, 27 N. S. 467, on the jurisdiction of a court to interfere with the discretion of a guardian in the control of a child; *Re Marshall*, 33 N. S. 104, on the jurisdiction of a court of chancery to control the custody of a child; *Re McGrath* [1892] 2 Ch. 496 [1893] 1 Ch. 143, 61 L. J. Ch. N. S. 549, 67 L. T. N. S. 636, 41 Week. Rep. 97, 62 L. J. Ch. N. S. 208, 2 Reports, 137, on the jurisdiction of the court over the religious education of child; *Thomasset v. Thomasset* [1894] P. 295, 63 L. J. Prob. N. S. 140, 6 Reports, 637, 71 L. T. N. S. 148, 42 Week. Rep. 658, holding that a court of chancery has power to make orders respecting the custody, maintenance and education of children during the whole period of their infancy.

The earlier decision by the same court was cited in *Brewer v. Cary*, 148

Mo. App. 193, 127 S. W. 685, holding that if guardian, or even parent, is unfit person, to have custody of children, remedy provided by statute is to institute proceedings in probate court.

Habeas corpus to determine custody of child.

Cited in *R. v. Redner*, 6 B. C. 73; *Re Soy King*, 7 B. C. 291,—on habeas corpus as lying to determine custody of child; *R. v. Gyngall* [1893] 2 Q. B. 232, 62 L. J. Q. B. N. S. 559, 4 Reports 448, 69 L. T. N. S. 481, 57 J. P. 773, on the jurisdiction of the court of chancery upon habeas corpus.

The earlier decision of court was cited in *Re Quai Shing*, 6 B. C. 86, on habeas corpus as lying to determine the custody of a child.

13 E. R. C. 57, *DREYFUS v. PERUVIAN GUANO CO.* 6 Asp. Mar. L. Cas. 492, L. R. 43 Ch. Div. 316, 62 L. T. N. S. 518, 34 S. J. 94, affirming the decision of Kay, J., Reported in 58 L. J. Ch. N. S. 758, L. R. 42 Ch. Div. 66, 60 L. T. N. S. 216.

Substitution of damages for injunction in equity.

Cited in *Martin v. Price* [1894] 1 Ch. 276, 63 L. J. Ch. N. S. 209, 7 Reports 90, 70 L. T. N. S. 202, 42 Week. Rep. 262, on the substitution of damages for an injunction to restrain a threatened injury; *Cowper v. Laidler* [1903] 2 Ch. 337, 72 L. J. Ch. N. S. 578, 51 Week. Rep. 539, on the right of a court to give damages instead of an injunction.

Cited in notes in 13 E. R. C. 100, on award of damages in lieu of injunction; 3 E. R. C. 54, on right to enjoin obstruction of ancient light.

Distinguished in *Shelfer v. London Electric Lighting Co.* 13 E. R. C. 78 [1895] 1 Ch. 287, 64 L. J. Ch. N. S. 216, 72 L. T. N. S. 34, 43 Week. Rep. 238, 12 Reports, 112, holding that where the injunction is sought to restrain a continuing nuisance damages may be substituted.

Jurisdiction of court of chancery.

Cited in *Alger v. Anderson*, 92 Fed. 696, on the jurisdiction of a court of chancery.

Interest on judgment in action of tort.

Distinguished in *Phillips v. Homfray*, L. R. 44 Ch. Div. 694, 59 L. J. Ch. N. S. 547, 62 L. T. N. S. 897, 39 Week. Rep. 45, holding that an action to recover for minerals wrongfully taken being an action for money had and received, the plaintiffs were not entitled to interest on the sum recovered.

Cited in note in 28 L.R.A.(N.S.) 81, on interest on unliquidated damages.

13 E. R. C. 78, *SHELFER v. LONDON ELECTRIC LIGHTING CO.* [1895] 1 Ch. 287, 64 L. J. Ch. N. S. 216, 72 L. T. N. S. 34, 12 Reports, 112, 43 Week. Rep. 238, reversing the decision of Kekewich, J., reported in 70 L. T. N. S. 762, 8 Reports, 823, 42 Week Rep. 644.

What constitutes a nuisance.

Cited in *Peck v. Newburgh Light, Heat & P. Co.* 132 App. Div. 82, 116 N. Y. Supp. 433, holding that vibrations may constitute a nuisance.

Enjoining maintenance of a nuisance.

Cited in *Colls v. Home & Colonial Stores* [1904] A. C. 179, 73 L. J. Ch. N. S. 484, 53 Week. Rep. 30, 90 L. T. N. S. 687, 20 Times L. R. 475, on the right to a mandatory injunction to restrain the interference with ancient lights; *Higgins v. Betts* [1905] 2 Ch. 210, 74 L. J. Ch. N. S. 621, 53 Week.

Rep. 549, 92 L. T. N. S. 850, 21 Times L. R. 552, on the right to an injunction to restrain interference with ancient lights.

Cited in notes in 34 L.R.A.(N.S.) 563, on right of one in possession to maintain action for nuisance without proving title; 31 L.R.A.(N.S.) 896, on doctrine of comparative injury in suit to enjoin nuisance.

—Caused by exercise of privileges conferred by law.

Cited in *Northern P. R. Co. v. United States*, 59 L.R.A. 80, 44 C. C. A. 135, 104 Fed. 691, on the right to injunction to restrain obstruction of river by railroad company under legal authority to construct railroad; *Brown v. Bathurst Electric & W. P. Co.* 3 N. B. Eq. Rep. 543, holding that the defendants would be restrained from making an unreasonable use of the water so as to create a nuisance, though it was necessary to carry on their business; *Midwood & Co. v. Manchester Corp.* [1905] 2 K. B. 597, 74 L. J. K. B. N. S. 884, 93 L. T. N. S. 525, 54 Week. Rep. 37, 69 J. P. 348, 3 L. G. R. 1136, 21 Times L. R. 667, holding that an electric lighting company was liable for the destruction of the defendant's goods by a fire from their mains, although authorized by law to lay the mains; *Saunby v. London Water Comrs.* [1906] A. C. 110, 75 L. J. P. C. N. S. 25, 93 L. T. N. S. 648, 22 Times L. R. 37, holding that an injunction would be issued to restrain the defendant from creating a nuisance in the exercise of conferred authority.

Cited in notes in 27 L.R.A.(N.S.) 240, on right of property owner to damages or injunction for electric light plant in vicinity; 16 E. R. C. 581, on local or statutory authority as justification for a nuisance.

Cited in *Joyce, Nuis.* 231, on effect of legalizing of business on question of nuisance.

—Nuisance by mechanical vibrations, vapors, or odors.

Cited in *American Smelting & Ref. Co. v. Godfrey*, 89 C. C. A. 139, 158 Fed. 225, 4 Ann. Cas. 8, on right to injunction by farmers to restrain operation of a smelter; *Hopkin v. Hamilton Electric Light & Cataract Power Co.* 2 Ont. L. Rep. 240, holding that a party was entitled to damages for injury to his land by vibration caused by the operation of heavy machinery on adjoining land; *Appleby v. Erie Tobacco Co.* 22 Ont. L. Rep. 533, 20 Ann. Cas. 731, holding that odors arising from manufacture of tobacco on adjoining premises may be enjoined, where damages would not be adequate remedy.

—Substitution of damages for injunction.

Cited in *Rainey v. Red River, T. & S. R. Co.* 99 Tex. 276, 3 L.R.A.(N.S.) 590, 122 Am. St. Rep. 622, 89 S. W. 768, 13 Ann. Cas. 580, on the right to substitute damages for injunction to restrain continuing nuisance; *Arthur v. Grand Trunk R. Co.* 22 Ont. App. Rep. 89, holding that land owner may be granted damages in lieu of injunction in action against railroad company for diversion of water course, in absence of undertaking by company to restore water course to original condition; *Saunby v. Water Comrs.* C. R. [1906] A. C. 1, holding that an injunction may issue instead of leaving plaintiff only to substantial damages as relief where refusal of injunction would be to enable defendant to expropriate plaintiffs without statutory authority; *Jordeson v. Sutton, S. & D. Gas Co.* [1898] 2 Ch. 614 [1899] 2 Ch. 217, 68 L. J. Ch. N. S. 457, 80 L. T. N. S. 815, 63 J. P. 692, 67 L. J. Ch. N. S. 666, 14 Times L. R. 567, 15 Times L. R. 374, on the right to substitute damages for injunction; *Cowper v. Laidler* [1903] 2 Ch. 337, 72 L. J. Ch. N. S. 578, 89 L. T. N. S. 469, 51 Week. Rep. 539, holding that where the injunction is to restrain a continuing nuisance which is in existence the court may substitute damages; *Riley v. Halifax Corp.*

71 J. P. 428, 97 L. T. N. S. 278, 23 Times L. R. 613, 5 L. G. R. 909, holding that where the cost of removing the embankment was much less than the injury done by trespass to the land, the court could substitute damages for injunction.

Distinguished in *Kine v. Jolly* [1905] 1 Ch. 480, 74 L. J. Ch. N. S. 174, 53 Week. Rep. 462, 92 L. T. N. S. 209, 21 Times L. R. 128, holding that where the interference with ancient lights left the rooms with sufficient light the court should award damages instead of a mandatory injunction.

— Suit by tenant.

Cited in *Bly v. Edison Electric Illuminating Co.* 172 N. Y. 1, 58 L.R.A. 500, 64 N. E. 745, on the right of the tenant to sue for damages for injury to land by continuing nuisance.

Injunction where plaintiff's right is of small relative value.

Cited in *McCleery v. Highland Boy Gold Min. Co.* 140 Fed. 951, holding that the right to an injunction to restrain a continuing nuisance is not affected by the relative amount of capital invested in both businesses.

Right of water support.

Cited in *Jordeson v. Sutton, S. & D. Gas. Co.* [1898] 2 Ch. 614 [1899] 2 Ch. 217, 15 Times L. R. 374, 68 L. J. Ch. N. S. 457, 80 L. T. N. S. 815, 63 J. P. 692, 67 L. J. Ch. N. S. 666, 14 Times L. R. 567, on the right of water support.

13 E. R. C. 100, *BEDFORD v. BRITISH MUSEUM*, 2 L. J. Ch. N. S. 129, 2 Myl. & K. 552.

See S. C. 6 E. R. C. 702.

13 E. R. C. 101, *SAYERS v. COLLYER*, L. R. 28 Ch. Div. 103, 49 J. P. 244, 54 L. J. Ch. N. S. 1, 51 L. T. N. S. 723, 33 Week. Rep. 91, affirming the decision of *Pearson, J.*, reported in L. R. 24 Ch. Div. 180, 52 L. J. Ch. N. S. 770, 48 L. T. N. S. 939, 32 Week. Rep. 200.

Enforcement of restrictive building covenants.

Cited in notes in 15 E. R. C. 294, on right of third person to enforce restrictive building covenants: 15 E. R. C. 281, on necessity of purchaser observing restrictive stipulations known to him.

Cited in *Hollingsworth*, Contr. 408, on enforcement of restrictive covenants relating to land.

Discharge of restrictive covenant because of changed surroundings.

Cited in *Star Brewery Co. v. Primas*, 163 Ill. 652, 45 N. E. 145, holding that a negative covenant would not be enforced where the character of the neighborhood is changed by the grantor or those claiming under him: *De Gray v. Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388, holding that acquiescence in the violation of the restrictive covenant or abandonment of plan is fatal to a demand for relief for such violation; *Craig v. Greer* [1899] 1 Ir. Ch. 258, holding that the party did not lose his right to enforce a restrictive covenant merely by a change in the character of a neighborhood but it must have been done through his acts or conduct.

Cited in notes in 28 L.R.A.(N.S.) 707, 715, on enforcement of restrictive covenant as affected by change in neighborhood; 6 E. R. C. 718, on refusal to enforce performance of unfair contract or one involving hardship.

The decision of *Pearson, J.*, was cited in *Ewertsen v. Gerstenberg*, 186 Ill.

344, 51 L.R.A. 310, 57 N. E. 1050, holding that a building restriction will not be enforced by injunction where the property and neighborhood has so changed in character that it would be inequitable to enforce the restriction; *Coughlin v. Barker*, 46 Mo. App. 54, on the right to enforce a restrictive covenant; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691; *Orne v. Fridenberg*, 143 Pa. 487, 24 Am. St. Rep. 567, 22 Atl. 832, 28 W. N. C. 554,—holding that there may be such a change of surroundings that a court will refuse an injunction to restrain the violation of building restrictions; *McClure v. Leaycraft*, 35 N. Y. Civ. Proc. Rep. 159, holding that covenant in deed against erection of apartment house will not be enforced in equity, 20 years after date of deed, if conditions not contemplated at time have so changed character of property as to render enforcement of covenant inequitable; *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961, 5 Ann. Cas. 45, holding that restrictive covenant in relation to buildings will not be enforced by injunction where object of restriction has been defeated by character of buildings in vicinity.

—By abandonment of observance by others.

The decision of *Pearson, J.*, was cited in *Scharer v. Pantler*, 127 Mo. App. 433, 105 S. W. 668, holding that where observance of restriction, inserted in deeds to parcels of tract of ground in pursuance of general plan, is afterwards abandoned by those in whose favor covenant is inserted, it will not be specifically enforced against others.

Acquiescence as barring enforcement of right.

Cited in *Mallory v. Mallory Wheeler Co.* 61 Conn. 131, 23 Atl. 708, holding that in order that acquiescence may amount to a ratification it must be so long continued as to presume an affirmative act; *West Hartford v. Water Comrs.* 68 Conn. 323, 36 Atl. 786, holding that long continued acquiescence in the practical construction of a statute barred the right to deny that such was the real meaning; *Barrows v. Natchaug Silk Co.* 72 Conn. 658, 45 Atl. 951, on acquiescence by delay as barring enforcement of right; *Leaver v. Gorman*, 73 N. J. Eq. 129, 67 Atl. 111, holding that right to enjoin running of bottling factory in violation of restrictive covenant may be lost by acquiescence for several years, but party may enjoin further extension of business; *Zelman v. Kaufherr*, 76 N. J. Eq. 52, 73 Atl. 1048, holding that application for mandatory injunction to protect restrictive building covenant must be promptly made.

—To enforce restrictive covenant.

Cited in *Van Koughnet v. Denison*, 11 Ont. App. Rep. 699, on the loss of right to enforce restrictive covenant by laches; *Knight v. Simmonds* [1896] 2 Ch. 294, 65 L. J. Ch. N. S. 583, 74 L. T. N. S. 563, 44 Week. Rep. 580, holding that a party may lose his right to enforce a restrictive covenant by delay or acquiescence in breach; *Goddard v. Midland R. Co.* 8 Times L. R. 126; *Osborne v. Bradley* [1903] 2 Ch. 446, 73 L. J. Ch. N. S. 49, 89 L. T. N. S. 11,—on the loss of right to enforce restrictive covenants, by acquiescence in breach.

Distinguished in *Northumberland v. Bowman*, 56 L. T. N. S. 773, holding that a delay of fourteen months by a plaintiff in taking steps to prevent the continuance of a breach of a restrictive covenant will not amount to an acquiescence as to disentitle him to an injunction.

Substitution of damages for injunction, or other equitable relief.

Cited in *Institution for Savings v. Puffer*, 201 Mass. 41, 87 N. E. 562, holding that where peculiar equitable relief is refused, jurisdiction may be retained

by equity court for assessment of damages; *Arthur v. Grand Trunk R. Co.* 22 Ont. App. Rep. 89, on the right to damages in addition to or substitution for an injunction; *Alexander v. Mansions Proprietary*, 16 Times L. R. 431, on the right to substitute damages for an injunction.

Cited in note in 13 E. R. C. 100, on award of damages in lieu of injunction.

Effect on jurisdiction of repealing act containing saving clause.

Cited in *Dreyfus v. Peruvian Guano Co.* L. R. 42 Ch. Div. 66, 61 L. T. N. S. 180, 58 L. J. Ch. N. S. 758; *Cowper v. Laidler* [1903] 2 Ch. 337, 72 L. J. Ch. N. S. 578, 89 L. T. N. S. 469, 51 Week. Rep. 539,—on the jurisdiction of the court of equity with regard to injunction after the repeal of Lord Cairn's act; *Re R.* [1906] 1 Ch. 730, on the repeal of an act conferring certain jurisdiction as not affecting jurisdiction where repealing act contains a saving clause.

13 E. R. C. 112, *NEWSON v. PENDER*, 52 L. T. N. S. 9. 33 Week. Rep. 243, affirming the decision of the Vice Chancellor reported in L. R. 27 Ch. Div. 43.

See S. C. 3 E. R. C. 57.

13 E. R. C. 112, *GRIFFITH v. BLAKE*, L. R. 27 Ch. Div. 474, 53 L. J. Ch. N. S. 965, 51 L. T. N. S. 274, 32 Week. Rep. 833.

Undertaking as to damages for interlocutory injunction.

Cited in *New Vancouver Coal Co. v. Esquimalt & N. R. Co.* 6 B. C. 222, on the necessity of an undertaking as to damages before granting interlocutory injunction; *Atty. Gen. v. Albany Hotel Co.* [1896] 2 Ch. 696, 65 L. J. Ch. N. S. 885, 75 L. T. N. S. 195, on the limitation of the undertaking in damages required for interlocutory injunction.

Cited in note in 3 E. R. C. 75, on remedy for obstruction of ancient light.

13 E. R. C. 118, *BENNETT v. MELLOR*, 2 Revised Rep. 593, 5 T. R. 273.

Duties of innkeeper to guest.

Cited in note in 2 B. R. C. 684, 689, on duty of innkeeper as to shelter and entertainment of traveler.

Liability of innkeeper for safety of property of guest.

Cited in *Shaw v. Berry*, 31 Me. 478, 52 Am. Dec. 628, holding that an innkeeper is bound to keep the goods of a guest safe as against everything but inevitable accident or acts of public enemies, or the owners of the property; *Burrows v. Trieber*, 21 Md. 320, 83 Am. Dec. 590, holding that an innkeeper is liable for goods of a guest which are brought with him into the inn; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655 (reversing 3 Robt. 352, 19 Abb. Pr. 190), on change in the liability of an innkeeper by statute; *Ticehurst v. Beinbrink*, 72 Misc. 365, 129 N. Y. Supp. 838, holding that liability of innkeeper, as such, for property left with him, depends upon existence of relation of host and guest; *Mowers v. Fethers*, 6 Lans. 112, holding that innkeepers were liable for loss of horse and wagon by fire, where under agreement for meals of owner of horse and for horses feed, owner was to put up at inn for certain number of days in each week, and agreement did not fix amount to be paid by such owner for lodging; *Mowers v. Fethers*, 61 N. Y. 34, 19 Am. Rep. 244 (reversing 6 Lans. 112), holding that the innkeeper is not liable unless the relation of innkeeper and guest exists; *Ingalsbee v. Wood*, 36 Barb.

452, holding that an innkeeper is not liable unless the relation of landlord and guest exists.

Cited in note in 25 L. ed. U. S. 104, on liability of innkeeper for goods and money of guest.

Distinguished in *Thickstun v. Howard*, 8 Blackf. 535, holding that one who was an innkeeper was not liable for the death of a horse left with him by a friend, who was not a guest; *Strauss v. County Hotel & Wine Co.* 13 E. R. C. 121, L. R. 12 Q. B. Div. 27, 53 L. J. Q. B. N. S. 25, 49 L. T. N. S. 601, 32 Week. Rep. 170, holding that the inn-keeper was not liable for the loss of goods where the relation of landlord and guest did not exist.

— Guests not lodged in inn.

Cited in *Kopper v. Willis*, 9 Dal'y, 460, holding that an inn-keeper was liable for the theft of an overcoat, while the guest was eating a meal, though he did not lodge at the inn; *Orchard v. Bush* [1898] 2 Q. B. 284, 67 L. J. Q. B. N. S. 650, 78 L. T. N. S. 557, 46 Week. Rep. 527, 14 Times L. R. 425, holding that where the plaintiff stopped at the hotel for a midday meal, the relation of landlord and guest existed so that the inn-keeper was liable for the theft of an overcoat.

— Goods not intrusted to keeping of innkeeper.

Cited in *Piper v. Manny*, 21 Wend. 283, holding that the innkeeper was liable for goods stolen from the wagon of the plaintiff, left near a public road where servant of innkeeper designated the place; *Clute v. Wiggins*, 14 Johns. 175, 7 Am. Dec. 448, holding that innkeepers are liable for goods of a guest lost or stolen out of their inns whether they had personal possession of the goods, or whether or not they are negligent; *Stanton v. Leland*, 4 E. D. Smith, 88, holding that the liability of an innkeeper extends to money stolen from the trunk of a guest.

Cited in 5 *Thompson, Neg.* 1046, on necessity that goods be in custody of innkeeper to render him liable for loss.

Distinguished in *Bradley Livery Co. v. Snook*, 66 N. J. L. 654, 55 L.R.A. 208, 50 Atl. 358, holding that horses merely tied in a shed without notice to an innkeeper or his hostler are not in the custody of the innkeeper, and he is not liable for their loss.

Limited in *Treiber v. Burrows*, 27 Md. 130, holding that money in a trunk of a guest at an inn must be of such an amount only as would be convenient to meet traveling expenses of one in the condition of the guest or the innkeeper is not liable.

— To master for property in possession of a servant.

Cited in *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417, holding that an innkeeper is liable to a corporation for money stolen from their agent, while a guest, and which money was property of the corporation; *Walker v. Sharpe*, 31 U. C. Q. B. 340, on the right of the master to sue for loss of property in possession of servant while guest at an inn.

— Exoneration from liability by guest's neglect.

Cited in *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369, holding that innkeepers are liable for the loss of goods of a guest even though they were not deposited in an iron safe provided for that purpose; *Read v. Amidon*, 41 Vt. 15, 98 Am. Dec. 560, holding that the innkeeper is exonerated from liability if the guest exposes the goods to unnecessary danger of loss.

Who is a guest.

Cited in *Wilkins v. Earle*, 3 Robt. 352, 19 Abb. Pr. 190, holding that time of stopping is immaterial in determining whether person is guest or not as stopping for mere refreshments may constitute person guest; *McDonald v. Edgerton*, 5 Barb. 560, holding that purchasing liquor at an inn is sufficient to constitute the purchaser a guest; *Neal v. Wilcox*, 49 N. C. (4 Jones, L.) 146. 67 Am. Dec. 266, holding that a transient customer at an inn, although not a traveler or a stranger, is a guest; *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 58 Am. Rep. 781, 4 N. E. 398, holding that by simply depositing money with the innkeeper for safe keeping one does not thereby become a guest; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574, holding that the relation of guest is created by putting his horse at an inn and by taking a room and taking some of his meals at the inn and lodging there part of the time.

Distinguished in *Downing v. St. Columba's R. C. T. A. B. Soc.* 10 Daly, 262, holding that one invited by a guest to a hotel, but who has no intention of remaining as a guest, is not a guest.

Liability of carrier for loss of passenger's baggage.

Cited in *Bankier v. Wilson*, 5 Lower Can. Rep. 203, holding that owner of steamboat on river is liable for loss by theft of passenger's baggage left outside of cabin door, where employee told passenger that baggage would be safe there.

13 E. R. C. 121, *STRAUSS v. COUNTY HOTEL & WINE CO.* 48 J. P. 69, 53 L. J. Q. B. N. S. 25, 49 L. T. N. S. 601, L. R. 12 Q. B. Div. 27, 32 Week. Rep. 170.

What constitutes relation of innkeeper and guest.

Cited in *Brewer v. Caswell*, 132 Ga. 563, 23 L.R.A.(N.S.) 1109, 131 Am. St. Rep. 216, 64 S. E. 674, holding that merely leaving horse at hotel barn does not establish relation of innkeeper and guest where owner, while he intended to, did not in fact take meals or lodging at hotel; *Bunn v. Johnson*, 77 Mo. App. 596, holding that if one should engage and pay for room in hotel merely to secure safe place for deposit of his valuables, he would not be guest; *Metzler v. Terminal Hotel Co.* 135 Mo. App. 410, 115 S. W. 1037, holding that one who kept hotel for purpose of lodging guests only, but convenient to restaurant, run by another, was "innkeeper" and liable as such to guest for failure to return baggage committed to his care.

Liability of innkeeper for property of guest.

Cited in *Ticehurst v. Beinbrink*, 72 Misc. 365, 129 N. Y. Supp. 838, holding that liability of innkeeper, as such for property left with him, depends upon existence of relation of host and guest.

Cited in note in 23 L.R.A.(N.S.) 1108, on what acts, with respect to baggage, will initiate relation of innkeeper and guest so as to create liability for loss or injury.

—For nonprotection of guests from insult.

Cited in *De Wolf v. Ford*, 119 App. Div. 808, 104 N. Y. Supp. 876, holding that innkeeper is not liable on contract to protect his guests from insults by his employees.

13 E. R. C. 131, *SPICE v. BACON*, L. R. 2 Exch. Div. 463, 46 L. J. Exch. N. S. 713, 36 L. T. N. S. 896, 25 Week. Rep. 840.

Liability of innkeeper for property of guest.

Cited in *Spring v. Hager*, 145 Mass. 186, 1 Am. St. Rep. 451, 13 N. E. 479, holding that if guest locks door of room upon retiring at night but fails to fasten it with bolt, he cannot be said to be guilty of negligence and innkeeper is liable for value of property stolen during night from room.

Cited in notes in 22 L.R.A.(N.S.) 577, on effect of statute limiting innkeeper's liability for goods not delivered into his custody; 13 Eng. Rul. Cas. 124, 128, on liability of innkeeper for property of guest.

— For property of guest lost through his negligence.

Cited in *Herbert v. Markwell*, 45 L. T. N. S. 649, 46 J. P. 358, on what is sufficient evidence of negligence to make innkeeper liable.

Sufficiency of notice required by statute.

Cited in *R. v. Mah Yin*, 9 B. C. 319, on the sufficiency of a notice of appeal in describing the offense; *Canada Atlantic R. Co. v. Ottawa*, 12 Ont. App. Rep. 234, on the strictness required in copying or publishing a notice required by statute; *Northeote v. Brunker*, 14 Ont. App. Rep. 364, holding that a notice under the statute, not to sell liquor to a habitual drunkard, was insufficient where it did not state that the husband drank to excess; *Craig v. Cromwell*, 27 Ont. App. Rep. 585, on the sufficiency of a notice of mechanic's lien under the statute.

— Effect of slight variation from words of statute.

Cited in *Ballagh v. Royal Mut. F. Ins. Co.* 44 U. C. Q. B. 70, on the effect of variation from condition of statute; *Re Gloucester Election*, 31 N. B. 533, on the sufficiency of a petition in an election contest, which varies slightly from the statute.

Distinguished in *Re Caldwell*, 30 Ont. Rep. 378, holding that where the omitted word does not alter the statute by its absence, its omission is immaterial.

13 E. R. C. 136, *THRE FALL v. BORWICK*, 44 L. J. Q. B. N. S. 87, L. R. 10 Q. B. 210, 32 L. T. N. S. 95, 23 Week. Rep. 312, affirming the decision of the Court of Queen's Bench, reported in 41 L. J. Q. B. N. S. 266, L. R. 7 Q. B. 711.

Lien of innkeeper on property of third person placed with him by a guest.

Cited in *White v. Smith*, 44 N. J. L. 105, 43 Am. Rep. 347, on the lien of an innkeeper upon goods of a third person, put into his hands by a guest; *Cook v. Kane*, 13 Or. 482, 57 Am. Rep. 28, 11 Pac. 226, holding that the innkeeper has a lien upon property of a third party, put into his possession as innkeeper by a guest, if he did not know of the other's ownership; *Newcombe v. Anderson*, 11 Ont. Rep. 665, on the lien of a boarding-house keeper on property leased to guest.

Cited in notes in 24 L.R.A.(N.S.) 958, on innkeeper's lien on third persons' property in possession of guest; 21 L.R.A. 230, and 13 E. R. C. 149, on lien of innkeeper.

Distinguished in *Wyckoff v. Southern Hotel Co.* 24 Mo. App. 382, holding that under the statute an innkeeper has no lien upon property of a third person, left in his possession by a guest.

The decision of the Court of Queen's Bench was cited in *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 21 L.R.A. 229, 38 Am. St. Rep. 568, 55 N. W. 56, holding

that an innkeeper's lien attaches to goods of a third person left in his hand by a guest, if he had no notice of the fact of the other's ownership.

The decision of the court of Queen's Bench was distinguished in *Sargert v. Usher*, 55 N. H. 287, 20 Am. Rep. 208, holding that one who has boarded horses, put into his hands by the mortgagor, has no lien for their keeping as against the mortgagee, unless he consented.

Lien of livery-stable keeper on horse placed with him by thief.

Cited in *Harding v. Johnston*, 18 Manitoba L. Rep. 625, holding that livery stable keeper has no lien on horse for its stabling and keep as against real owner when horse was stolen and placed with him by thief.

13 E. R. C. 138, *ROBINS v. GRAY*, 59 J. P. 741, 65 L. J. Q. B. N. S. 44, 73 L. T. N. S. 252, [1895] 2 Q. B. 501, 14 Reports, 671, 44 Week. Rep. 1, affirming the decision of *Wills, J.* reported in [1895] 2 Q. B. 78, 64 L. J. Q. B. N. S. 591.

Innkeeper's lien.

Cited in *Polk v. Melenbacker*, 136 Mich. 611, 99 N. W. 867, holding that hotel keeper had lien on property brought to hotel by guest, although it was property of guest's principal which had been intrusted to guest to enable him to carry on principal's business.

Cited in note in 24 L.R.A.(N.S.) 960, on innkeeper's lien on third person's property in possession of guest.

Duties of innkeeper.

Cited in note in 2 Brit. Rul. Cas. 684, on duty of innkeeper as to shelter and entertainment of traveler.

Liability of innkeeper for safety of property of guest.

Cited in *Barrie v. Wright*, 15 Manitoba L. Rep. 197, on the common law liability of an innkeeper for the safety of the property of a guest.

Cited in note in 13 E. R. C. 125, on liability of innkeeper for property of guest.

Validity of statute giving innkeeper's lien upon property brought by guest.

Cited in *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 24 L.R.A.(N.S.) 958, 121 Am. St. Rep. 886, 82 N. E. 143, 12 Ann. Cas. 397, holding that statute giving keeper of hotel lien upon property brought by guest, although owned by third person, is not in violation of due process of law.

Livery stable keeper's lien on horse placed with him by thief.

Cited in *Harding v. Johnston*, 18 Manitoba L. Rep. 625, holding that livery stable keeper has no lien on horse for its stabling and keep as against real owner when horse was stolen and placed with him by thief.

13 E. R. C. 151, *LUCENA v. CRAUFURD*, 3 Bos. & P. 75, 6 Revised Rep. 623, reversed in 2 Bos. & P. N. R. 269, 13 E. R. C. 159.

What constitutes contract of nuisance.

Cited in *Re Fire Certificates*, 20 Pa. Dist. R. 825, holding that separate written contract or fire certificate, accompanying and made part of contract of lease of piano, by which lessor agrees to restore piano if damaged by fire, while in possession of lessee is not contract of insurance.

Insurable interest.

Cited in *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. 159, 22 L. ed. 250, 31

Leg. Int. 262, 6 Legal Gaz. 293, holding advances to equip a vessel are a lien and constitute an insurable interest; Philadelphia Ins. Co. v. Washington Ins. Co. 23 Pa. 250, holding an insurable interest can spring from a prior insurance and may arise from a time policy as well as from any other; Swift v. Vermont Mut. F. Ins. Co. 18 Vt. 314, holding that equitable estate in fee simple may be insured; Hurd v. Doty, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371, as to validity of contract of insurance on life of another on which the party procuring the insurance had no interest; Howard F. Ins. Co. v. Chase, 5 Wall. 509, 18 L. ed. 524, holding creditor of insuring trustee of church entitled to recover on policy; Clark v. Scottish Imperial Ins. Co. 4 Can. S. C. 706, holding equitable interest sufficient; Bishop v. Clay F. & M. Ins. Co. 49 Conn. 167 (dissenting opinion); Palmer v. Yates, 3 Sandf. 137; Hooper v. United States, 22 Ct. Cl. 408; McRossie v. Provincial Ins. Co. 34 U. C. Q. B. 55,—as to what constitutes insurable interest; Ogden v. Montreal Ins. Co. 3 U. C. C. P. 497, holding that holder of chattel mortgage has insurable interest, though mortgagor continues in actual possession of goods mortgaged; Pettigrew v. Grand River Farmers' Mut. Assur. Co. 28 U. C. C. P. 70, holding where father held the land with an understanding with his son that he should reconvey to son whenever latter wished, the son had an insurable interest in the buildings; Orchard v. Aetna Ins. Co. 5 U. C. C. P. 445, holding a stranger to the property in both the vessel and her cargo cannot create an insurable interest in the freight by spontaneously advancing the amount of such freight to the master or owner of the vessel.

Cited in notes in 13 Eng. Rul. Cas. 214, on insurable interest in property; 13 Eng. Rul. Cas. 313, on right to insure expectant value or profits from success of adventure; 13 Eng. Rul. Cas. 377, 378, on insurable interest of purchaser.

— Of husband on wife's property.

Cited in American Cent. Ins. Co. v. McLanathan, 11 Kan. 533, holding that husband who effects insurance on building on wife's property, which is occupied by both, may, where company had knowledge of facts, recover on policy in case of loss, in his own name.

— Of master, agent or custodian.

Cited in Herkimer v. Rice, 27 N. Y. 163, holding the administrator of an insolvent estate has an insurable interest in the buildings belonging to it; De Forest v. Fulton F. Ins. Co. 1 Hall, 94, holding commission merchant, having in his possession goods of his principal, deposited with him for sale may insure the property in his own name; Buck v. Chesapeake Ins. Co. 1 Pet. 151, 7 L. ed. 90, holding the master of a vessel, to whom property shipped on board the vessel under his command is to be consigned, in absence of proof that the owner of the property had not given authority to order insurance has an insurable interest on property on board his vessel; Clark v. Scottish Imperial Ins. Co. 4 Can. S. C. 192, holding that one who advances money upon vessel then in course of construction, under agreement that when vessel was launched it would be placed in his hands for sale, and that out of proceeds advances would be paid has insurable interest.

Cited in notes in 13 Eng. Rul. Cas. 263, 264, on insurable interest of consignee or factor; 13 Eng. Rul. Cas. 275, on insurable interest of agent.

Cited in 2 Beach, Trusts, 1029, on power of trustee to insure trust property.

— Of captor as prize.

Cited in Seamans v. Loring, 1 Mason, 127, Fed. Cas. No. 12,583; Stewart v. United States, 1 Ct. Cl. 113,—as to captors of vessel having insurable interest prior to condemnation.

—At or after inception of risk.

Cited in *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219, holding no proof necessary that assured had an insurable interest at time of taking policy, it is sufficient if such interest subsisted during the risk and when the loss occurred.

Nonexistence of legal interest as giving right to return premium.

Cited in note in 14 E. R. C. 519, on right to return of premium where no legal interest existed.

Suit by agent for principal.

Cited in *Hecksher v. Binney*, 3 Woodb. & M. 333, Fed. Cas. No. 6,316, as to when agent may sue in own name.

13 E. R. C. 159, *LUCENA v. CRAUFURD*, 2 Bos. & P. N. R. 269, reversing 3 Bos. & P. 75, 13 E. R. C. 151, decision on later writ of error in 1 Taunt. 325, 13 E. R. C. 199.

Nature of insurance.

Cited in *Cummings v. Cheshire County Mut. F. Ins. Co.* 55 N. H. 457, holding it is a contract of indemnity, appertaining to the person or party to the contract, rather than to the property subjected to the risk against which its owner is protected.

Cited in *Smith*, Pers. Prop. 221, on nature of contract of insurance.

Validity of wager policies.

Cited in *Citizens' Ins. Co. v. Parsons*, 4 Can. S. C. 215, on all contracts for wager policies and wagers which were not contrary to the policy of the law being legal contracts at common law.

Insurable interest.

Cited in *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. 159, 22 L. ed. 250, 31 Phila. Leg. Int. 262, rereported in 31 Phila. Leg. Int. 406, 6 Legal Gaz. 293, holding advances to equip a vessel are a lien and constitute an insurable interest; *Hancox v. Fishing Ins. Co.* 3 Sumn. 132, Fed. Cas. No. 6,013, holding lien an insurable interest; *Sturm v. Atlantic Mut. Ins. Co.* 6 Jones & S. 281, holding absolute right of property does not necessarily constitute an ingredient in determining the question of insurable interest; *French v. Rogers*, 16 N. H. 177, holding mortgagor has insurable interest to extent of value of property insured; *Waring v. Loder*, 53 N. Y. 581, holding a mortgagor whose bond or obligation to pay the mortgage debt accompanies the mortgage has, after a sale of the mortgaged premises an insurable interest in the property; *White v. Hudson River Ins. Co.* 7 How. Pr. 341, holding one holding property under a trust deed for payment of himself and other creditors of assignor has an insurable interest; *Hoyt v. New York L. Ins. Co.* 3 Bosw. 440, holding that one who will by the death of another, in the ordinary course of events, incur loss or disadvantage as a result of death of insured has insurable interest in his life; *Kline v. Queen Ins. Co.* 7 Hun, 267, holding that general agent having care, management and control of property, with power to dispose of it, has sufficient interest in property to entitle him to effect insurance on it in his own name; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448, holding mortgagor and mortgagee both have insurable interests but neither can, as a general rule take advantage of an insurance effected by the other; *Humphrey v. London & L. Ins. Co.* 8 N. S. 39, holding that one in possession of real estate at time of loss under land contract, has insurable interest where he had made improve-

ments, although he could not have demanded possession at time policy was signed; *Donaldson v. Providence Assur. Mut. Contre Le Feu*, Rap. Jud. Quebec 36 C. S. 439,—on what constitutes an insurable interest; *Box v. Provincial Ins. Co.* 18 Grant, Ch. (U. C.) 280, holding that purchaser of quantity of wheat out of large quantity in warehouse, who is given warehouse receipt for quantity purchased has insurable interest although wheat was not separated from bulk; *Davies v. Home Ins. Co.* 24 U. C. Q. B. 364, holding that general creditor has not insurable interest in debtor's chattels; *Ebsworth v. Alliance M. Ins. Co.* 13 E. R. C. 215, L. R. 8 C. P. 596, 42 L. J. C. P. N. S. 305, 29 L. T. N. S. 479, 2 Asp. Mar. L. Cas. 125, holding consignees who had advanced money on goods had insurable interest; *Moran, G. & Co. v. Uzielli* [1905] 2 K. B. 555, 74 L. J. K. B. N. S. 494, 21 Times L. R. 378, 10 Com. Cas. 203, 54 Week. Rep. 250, holding creditors of ship owners who had lien on ship for part of their advances had insurable interest.

Cited in notes in 13 Eng. Rul. Cas. 377, 378, on insurable interest of purchaser; 13 Eng. Rul. Cas. 275–277, on insurable interest of agent.

—Expectancy or contingency.

Cited in *Putnam v. Mercantile*, 5 Met. 386, holding a commission merchant, to whom the cargo of a vessel is consigned for sale, has an insurable interest in his expected commissions, and may insure the same while the vessel is on her voyage; *Sawyer v. Dodge County Mut. Ins. Co.* 37 Wis. 503, holding open policies insuring future material productions in course of industry of assured, valid; *Hooper v. Robinson*, 98 U. S. 528, 25 L. ed. 219, holding contingent interest insurable; *Alsop v. Commercial Ins. Co.* 1 Sumn. 451, Fed. Cas. No. 262; *Wilson v. Jones*, 13 E. R. C. 299, L. R. 2 Exch. 139, 36 L. J. Exch. N. S. 78, 16 L. T. N. S. 669, 15 Week. Rep. 435; *M'Swiney v. Royal Exch. Assur. Co.* 13 E. R. C. 279, L. R. 14 Q. B. 634, 18 L. J. Q. B. N. S. 193,—holding expectant profits in an adventure may be insured; *Davies v. Home Ins. Co.* 3 U. C. Err. & App. 269, holding that insurable interest need not be so great as a certainty, and must not be so low as mere expectancy.

—Possession as interest.

Cited in *Durand v. Thouron*, 1 Port. (Ala.) 238, holding one having possession of the goods of another may insure them for the benefit of the latter without authority in the first instance and the cestui que trust may adopt the policy; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533, holding husband who built house on wife's lot had an insurable interest in the property; *Michael v. St. Louis Mut. F. Ins. Co.* 17 Mo. App. 23, holding that one who is in possession of goods under contract of purchase has insurable interest therein, equal to amount paid by him; *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543, 46 Am. Rep. 792, holding a husband, who, with his wife, is in the possession and enjoyment of her personalty has an insurable interest therein; *Sturm v. Atlantic Mut. Ins. Co.* 63 N. Y. 77, holding one who has control of property either as owner, consignee or agent may effect an insurance thereon in his own name; *White v. Madison*, 26 N. Y. 117, 26 How. Pr. 481, holding that sheriff who has goods in his custody under process, has insurable interest; *Worthington v. Collins*, 33 W. Va. 406, holding that one who charters barge for trip, and has custody and possession of it, may insure it in his own name, not only for his own protection but for protection of owner.

What interest sufficient to keep insurance policy alive.

Cited in *Key ex rel. Heaton v. Continental Ins. Co.* 101 Mo. App. 344, 74 S. W. 162, holding that indorser on note secured by mortgage notwithstanding

he deposited policy of insurance as collateral to secure payment of note, will be liable on note, and is entitled to bring action on policy; *French v. Rogers*, 16 N. H. 180, 181, holding that a mere mortgage of property insured will not operate such a transfer of the interest of mortgagor in property insured as to vitiate the policy.

Devestiture of insurable interest.

Cited in *Holbrook v. American Ins. Co.* 1 Curt. C. C. 193, Fed. Cas. No. 6,589, holding a conveyance which equity will treat as a mortgage will not terminate the interest of the assured; *Gordon v. Massachusetts F. & M. Ins. Co.* 2 Pick. 249, as to effect of abandonment on insurance; *Lazarus v. Commonwealth Ins. Co.* 5 Pick. 76, as to absolute transfer of property divesting; *Hitchcock v. North Western Ins. Co.* 26 N. Y. 68, holding the conveyance of a vessel, accompanied by a reconveyance by the way of mortgage, does not work a transfer or termination of mortgagee's interest, within the meaning of a marine policy providing that it should become void if the insured assigned his interest in the property without the consent of insurer; *State Mut. F. Ins. Co. v. Updegraff*, 21 Pa. 513, holding a vendor of real estate after articles of agreement and before conveyance has an insurable interest; *Dalby v. India & L. Life Assur. Co.* 13 E. R. C. 383, 24 L. J. C. P. N. S. 2, 15 C. B. 365, 18 Jur. 1024, holding it no ground for refusing payment on a life insurance policy that the interest of the beneficiary in the life of the assured has ceased.

Effect of adoption of policy of insurance procured by agent.

Cited in *Watkins v. Durand*, 1 Port. (Ala.) 251, holding that adoption of policy of insurance obtained by person holding property as trustee or agent, within reasonable time after loss, will bind insurer.

Description in policy of thing insured and interest therein.

Cited in *White v. Hudson River Ins. Co.* 7 How. Pr. 341, holding though a policy of insurance must correctly state what is insured, it is not necessary that the particular interest in the property, or the reason why that party insures, should also be expressed; *Mackenzie v. Whitworth*, 13 E. R. C. 322, L. R. 1 Exch. Div. 36, 45 L. J. Exch. N. S. 233, 33 L. T. N. S. 655, 24 Week. Rep. 287, 2 Asp. Mar. L. Cas. 490, holding if profits are insured they must be described as such.

Insurance on property as inclusive of profit therefrom or interest therein.

Cited in *Allkins v. Jupe*, L. R. 2 C. P. Div. 375, 46 L. J. C. P. N. S. 824, 36 L. T. N. S. 851, as to whether insurance on "goods, merchandise or effects," includes an insurance on profits; *Anderson v. Morice*, 23 E. R. C. 302, L. R. 1 App. Cas. 713, 3 Asp. Mar. L. Cas. 290, 46 L. J. C. P. N. S. 11, 35 L. T. N. S. 566, 25 Week. Rep. 14, L. R. 10 C. P. N. S. 609, holding insurance on "rice" cannot be construed as covering profits derived from sale of rice.

Pleading insurable interest.

Cited in *Hamburg-Bremen F. Ins. Co. v. Lewis*, 4 App. D. C. 66, holding where agent sues on policy the beneficial interest of the principal must be averred; *Dunlop v. Ætna Ins. Co.* 2 U. C. C. P. 252, holding declaration on joint policy of insurance should state interest of both; *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497, to the point that in declaring upon policy plaintiff must allege existence of interest at time of loss, and defendant may traverse interest alleged; *Cousins v. Nantes*, 13 E. R. C. 342, 3 Taunt. 513, 12 Revised Rep. 696, as to necessity of averment of interest.

Title to sue on insurance policy.

Cited in *Lloyd v. Fleming*, L. R. 7 Q. B. 299, 41 L. J. Q. B. N. S. 93, 25 L. T. N. S. 824, 20 Week. Rep. 296, 1 Asp. Mar. L. Cas. 192, holding a policy of marine insurance cannot be assigned, after loss, so as to entitle assignee to sue upon it in his own name.

Construction of statute by considering title.

Cited in *Kirk v. Dean*, 2 Binn. 341, to the point that title to act of parliament may be considered in construing ambiguous act.

13 E. R. C. 199, *LUCENA v. CRAUFURD*, 1 Taunt. 328, decision on former proceedings in error in 2 Bos. & P. N. R. 269, 13 E. R. C. 159.

—Insurable interest.

Cited in *Trade Ins. Co. v. Barracloiff*, 45 N. J. L. 543, 46 Am. Rep. 792, holding husband in possession of wife's property has insurable interest therein; *Watson v. Swan*, 2 E. R. C. 346, 31 L. J. C. P. N. S. 210, 11 C. B. N. S. 756, holding where insurance was in name of any person interested company by writing policy contracted with any person who might be interested in goods insured.

Cited in notes in 13 Eng. Rul. Cas. 277, on insurable interest of agent; 13 Eng. Rul. Cas. 313, 314, on right to insure expectant value of profits from success of adventures.

Insurance for benefit of another or by agent for principal.

Cited in *Turner v. Burrows*, 8 Wend. 144, as to validity of insurance effected by agent without authority; *Seamans v. Loring*, 1 Mason, 127, Fed. Cas. No. 12,583, as to prize agent having authority to insure for benefit of captors.

—Adoption by principal.

Cited in *Kline Bros. & Co. v. Royal Ins. Co.* 192 Fed. 378, holding that contract for insurance made by unauthorized agent on behalf of his principal on which premium has not been paid is not binding on insurer before principal has ratified; *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497, holding after loss plaintiff could adopt policy made for his benefit though previously ignorant of its existence.

—Averment of authority or adoption.

Cited in *Hamburg-Bremen F. Ins. Co. v. Lewis*, 4 App. D. C. 66, holding where agent effects insurance without consent of principal the beneficial interest of the latter must be averred.

Ratification by principal of acts of agents.

Cited in *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845, as to what constitutes.

Pleading venue.

Cited in *Beal v. Field*, 3 U. C. Q. B. O. S. 236, on averment to lay venue.

13 E. R. C. 215, *EBSWORTH v. ALLIANCE MARINE INS. CO.* 2 Asp. Mar. L. Cas. 125, 42 L. J. C. P. N. S. 305, L. R. 8 C. P. 596, 29 L. T. N. S. 479.

Insurable interest to cover advances.

Cited in *Clark v. Scottish Imperial Ins. Co.* 4 Can. S. C. 192, holding one advancing money to build vessel had insurable interest in vessel.

Cited in note in 13 Eng. Rul. Cas. 210, on insurable interest in property.

Ratification of agent's acts.

Cited in note in 2 Eng. Rul. Cas. 356, as to when agent's act may be ratified.

Joint recovery on policy.

Cited in *Klein v. Union F. Ins. Co.* 3 Ont. Rep. 234, as to right of persons having different insurable interests jointly insured to recover jointly.

13 E. R. C. 265, *WOLFF v. HORNCastle*, 1 Bos. & P. 316, 4 Revised Rep. 808.

Insurable interest.

Cited in *Cumberland Bone Co. v. Andes Ins. Co.* 64 Me. 466, holding an interest held under an executory contract of sale an insurable one; *Locke v. North American Ins. Co.* 13 Mass. 61, holding equitable interest sufficient.

Cited in note in 13 E. R. C. 314, on right to insure expectant value or profits from success of adventure.

Cited in 2 *Hutchinson*, Car. 3d ed. 865, on carrier's right to insure goods.

— To cover debt.

Cited in *Toppin v. Atkinson*, 2 Mass. 365, as to general creditor not having.

— To cover lien or advances.

Cited in *Hancox v. Fishing Ins. Co.* 3 Sumn. 132, Fed. Cas. No. 6,013, holding lien an insurable interest; *Clark v. Scottish Imperial Ins. Co.* 4 Can. S. C. 192, holding one who advances money to build vessel has an insurable interest therein; *Davies v. Home Ins. Co.* 3 U. C. Err. & App. 269, holding one to whom policy has been assigned in trust to secure him against loss by reason of being accommodation indorser on notes has insurable interest.

— Possession as insurable interest.

Cited in *Bank of South Carolina v. Bicknell*, 1 Cliff. 85, Fed. Cas. No. 898, holding consignees who have a mere naked right to possession of goods have no insurable interest; *White v. Madison*, 26 N. Y. 117, holding sheriff who has goods in his custody under process has an insurable interest.

Description or declaration of insurable interest.

Cited in *White v. Hudson River Ins. Co.* 7 How. Pr. 341, holding though a policy of insurance must state correctly what is insured it is not necessary that the particular interest in the property, or the reason why, the party insures should also be expressed.

Ratification or adoption of insurance by agent.

Cited in *Miltenberger v. Beacon*, 9 Pa. 198, holding one for whose benefit insurance is made may recover from person taking out the insurance without showing a previous request to make the insurance; *Palmer v. Yates*, 3 Sandf. 137; *Parker v. Towers*, 2 Browne (Pa.) 80 (appx.); *Dafoe v. Johnstown Dist. Mut. Ins. Co.* 7 U. C. C. P. 55,—as to ratification of by principal.

Party to sue on insurance.

Cited in *Barnes v. Union Mut. F. Ins. Co.* 45 N. H. 21, holding where policy is procured by agent in his own name for benefit of his principal the agent may sue thereon in his own name.

Construction of insurance contracts.

Cited in *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77; *Driggs v. Albany Ins. Co.* 10 Barb. 440, as to policy being construed for benefit of trade and for the insured; *Merchants' Ins. Co. v. Edmond & Co.* 17 Gratt. 138, holding they are to be construed accurately and without favor to either party.

Subrogation of insurer.

Cited in *Burton v. Gore Dist. Mut. F. Ins. Co.* 12 Grant. Ch. (U. C.) 156, Notes on E. R. C.—82.

holding, where property was destroyed, the insurance company upon payment of debt to mortgagee was entitled to assignment of mortgage.

Statutes regulating insurance.

Cited in *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497, as to occasion for passing the statutes requiring insurable interest and statement thereof.

Acts of agent for principal.

Cited in *Central Bank v. Kendrick*, *Dudley* (Ga.) 66; *Den ex dem. Larason v. Lambert*, 13 N. J. L. 182,—as to when acts of agent bind principal.

Cited in *Reinhard, Ag.* 272, on right of agent to insure cargo and collect premium from principal.

— Party to sue.

Cited in *Hecksher v. Binney*, 3 Woodb. & M. 333, Fed. Cas. No. 6,316, as to right of agent to sue on contract made on behalf of principal.

“Consignee” defined.

Cited in *Elsworth v. Alliance M. Ins. Co.* 13 E. R. C. 215, L. R. 8 C. P. 596, 42 L. J. C. P. N. S. 305, 29 L. T. N. S. 479, 2 Asp. Mar. L. Cas. 125; *Lucena v. Craufurd*, 13 E. R. C. 159, 2 Bos. & P. N. R. 269,—as to what constitutes a “consignee” in distinction from buyer or agent.

13 E. R. C. 279, *M'SWINEY v. ROYAL EXCH. ASSUR. CO.* 18 L. J. Q. B. N. S. 193, 14 Q. B. 634, 13 Jur. 489, reversed in 14 Q. B. 646, 14 Jur. 998, 19 L. J. Q. B. N. S. 222, 13 E. R. C. 287.

Insurable interest.

Cited in *Davies v. Home Ins. Co.* 3 U. C. Err. & App. 269, holding one to whom policy has been assigned in trust to secure him against loss by reason of being accommodation indorser on notes has an insurable interest.

— Expectant profits.

Cited in *Mackenzie v. Whitworth*, 13 E. R. C. 322, L. R. 1 Exch. Div. 36, 45 L. J. Exch. N. S. 233, 33 L. T. N. S. 655, 24 Week. Rep. 287, 2 Asp. Mar. L. Cas. 490, as to expectant profits being insurable; *Wilson v. Jones*, 13 E. R. C. 299, L. R. 2 Exch. 139, 36 L. J. Exch. N. S. 78, 16 L. T. N. S. 669, 15 Week. Rep. 435, holding expectant profits in a venture insurable.

Delay by perils of sea as affecting liability of insurer.

Cited in *Howard v. Astor Mut. Ins. Co.* 5 Bosw. 38, holding that insurer of passage money, is not liable because vessel is delayed on her voyage by perils of sea, if she actually makes voyage in suitable condition to carry to port of destination.

Pleadings in actions on insurance policies.

Cited in *Brown v. Blackwell*, 35 U. C. Q. B. 239, to the point that 11 Geo. I. ch. 30, sec. 43, permitted certain insurance companies to plead in actions against them on their policies, what was equivalent to general issue.

13 E. R. C. 287, *ROYAL EXCH. ASSUR. CO. v. M'SWINEY*, 14 Jur. 998, 19 L. J. Q. B. N. S. 222, 14 Q. B. 646, reversing 14 Q. B. 634, 18 L. J. Q. B. N. S. 193, 13 Jur. 489, 13 E. R. C. 279.

Marine insurance, description of insurable interest.

Cited in *Anderson v. Morice*, L. R. 10 C. P. 609, 44 L. J. C. P. N. S. 341, 23 Eng. Rul. Cas. 302, L. R. 1 App. Cas. 713, 46 L. J. C. P. 11, 35 L. T. N. S. 566, 25 Week. Rep. 14, 3 Asp. Mar. L. Cas. 290, as to necessity of stating subject-matter of insurance in policy.

— Of profits or proceeds insured.

Cited in *Stock v. Inglis*, L. R. 9 Q. B. Div. 708, 52 L. J. Q. B. N. S. 30, 47 L. T. N. S. 416, 31 Week. Rep. 455, 4 Asp. Mar. L. Cas. 596, holding profits not covered by insurance on goods; *Inman S. S. Co. v. Bischoff*, L. R. 7 App. Cas. 670, 52 L. J. Q. B. N. S. 169, 47 L. T. N. S. 581, 31 Week. Rep. 141, 5 Asp. Mar. L. Cas. 6; *The Alps* [1893] P. 109, 62 L. J. Prob. N. S. 59, 1 Reports, 587, 68 L. T. N. S. 624, 41 Week. Rep. 527, 7 Asp. Mar. L. Cas. 337,—as to necessity of abandonment of contract of carriage by charter being specially insured against.

13 E. R. C. 299, *WILSON v. JONES*, 36 L. J. Exch. N. S. 78, L. R. 2 Exch. 139, 16 L. T. N. S. 669, 15 Week. Rep. 435.

Insurable interest.

Cited in *The Ferne Holme*, 46 Fed. 119, holding one advancing money to vessel has insurable interest therein; *Getchell v. Mercantile & Mfrs' Mut. F. Ins. Co.* 109 Me. 274, 42 L.R.A.(N.S.) 135, 83 Atl. 801, Ann. Cas. 1913E, 738, holding that interest of one who has parol lease of building for life of its owner at one half the rental value, and who has made improvements, is insurable; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451, holding it not necessary to show that insured was legal or equitable owner; *Riggs v. Commercial Mut. Ins. Co.* 125 N. Y. 7, 10 L.R.A. 684, 21 Am. St. Rep. 716, 25 N. E. 1058, holding that stockholder in corporation has insurable interest in specific corporate property; *Trade Ins. Co. v. Barracliff*, 45 N. J. L. 543, 46 Am. Rep. 792, holding husband being in possession and enjoyment of wife's property has an insurable interest therein; *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 167 (dissenting opinion); *McRossie v. Provincial Ins. Co.* 34 U. C. Q. B. 55 (dissenting opinion),—as to what constitutes; *Humphrey v. London & L. Ins. Co.* 8 N. S. 39, holding that one in possession of real estate at time of loss, under land contract, has insurable interest, where he had made improvements, although he could not have demanded possession at time policy was signed; *Griffiths v. Fleming* [1909] 1 K. B. 805, 2 B. R. C. 391, 78 L. J. K. B. N. S. 567, 100 L. T. N. S. 765, 25 Times L. R. 377, 53 Sol. Jo. 340, holding that husband has as such insurable interest in his wife's life.

Cited in note in 13 Eng. Rul. Cas. 211, on insurable interest in property.

— Interest in adventure or in voyage.

Cited in *Humphrey v. London & L. Ins. Co.* 8 N. S. 39, as to an interest in an adventure being insurable.

Designation of subject matter of insurance.

Cited in *Cunard v. Nova Scotia M. Ins. Co.* 29 N. S. 409, holding a reasonable certainty is all that is required.

Insurance or wager.

Cited in *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q. B. 484, 61 L. J. Q. B. N. S. 696, 56 J. P. 665, on indemnity as distinguishing mark of insurance.

Presumption as to seaworthiness of vessel.

Cited in *The Warren Adams*, 20 C. C. A. 486, 38 U. S. App. 356, 74 Fed. 413, holding where a vessel soon after leaving port, becomes leaky, without stress of weather or other adequate cause or injury, the presumption is that she was unsound before setting sail; *Ewart v. Merchants' M. Ins. Co.* 13 N. S. 168, as to when unseaworthiness is presumed.

13 E. R. C. 314, *CROWLEY v. COHEN*, 3 Barn. & Ad. 478, 1 L. J. K. B. N. S. 158.

Insurance, specification of interest insured.

Cited in *Western Assur. Co. v. Chesapeake Lighterage & Towing Co.* 105 Md. 232, 65 Atl. 637, 11 Ann. Cas. 956; *Cross v. National F. Ins. Co.* 132 N. Y. 133, 30 N. E. 390; *White v. Hudson River Ins. Co.* 7 How. Pr. 341; *Van Natta v. Mutual Security Ins. Co.* 2 Sandf. 490; *Stetson v. Insurance Co.* 3 Phila. 380, 16 Leg. Int. 147; *Keefer v. Phoenix Ins. Co.* 31 Can. S. C. 144; *Davies v. Home Ins. Co.* 3 U. C. Err. & App. 269; *Klein v. Union F. Ins. Co.* 3 Ont. Rep. 234; *Box v. Provincial Ins. Co.* 18 Grant, Ch. (U. C.) 280; *Caldwell v. Stadacona F. & L. Ins. Co.* 11 Can. S. C. 212; *Mackenzie v. Whitworth*, 13 E. R. C. 322, L. R. 1 Exch. Div. 36, 45 L. J. Exch. N. S. 233, 33 L. T. N. S. 655, 24 Week. Rep. 287, 2 Asp. Mar. L. Cas. 490,—holding if the subject-matter of insurance be rightly described the particular interest in it need not be specified.

Insurable interest.

Cited in *Richelieu & O. Nav. Co. v. Thames & M. Marine Ins. Co.* 58 Mich. 132, 24 N. W. 547, as to right of agents and bailees to insure; *Motley v. Manufacturers' Ins. Co.* 29 Me. 337, 50 Am. Dec. 591, holding every person having bona fide an interest in property, though without any title to it, may protect such interest by insurance; *Clark v. Ocean Ins. Co.* 16 Pick. 289, holding prospective profits in an adventure insurable; *Eastern R. Co. v. Relief F. Ins. Co.* 98 Mass. 420, holding a person has an insurable interest in property, by the existence of which he receives a benefit, whether he has or has not any title in or lien upon or possession of the property itself; *White v. Madison*, 26 N. Y. 117, holding sheriff who has goods in custody under process has an insurable interest; *Berry v. American Cent. Ins. Co.* 132 N. Y. 49, 28 Am. St. Rep. 548, 30 N. E. 254, holding tenant who has agreed verbally with his landlord to keep the demised premises insured has an insurable interest in the property; *Richardson v. Home Ins. Co.* 21 U. C. C. P. 291; *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497,—holding chattel mortgagee has insurable interest; *Elsworth v. Alliance M. Ins. Co.* 13 E. R. C. 215, L. R. 8 C. P. 596, 42 L. J. C. P. N. S. 305, 29 L. T. N. S. 479, 2 Asp. Mar. L. Cas. 125, as to extent of right of consignees under advances to insure and recover in their own names.

Cited in notes in 13 E. R. C. 274, on insurable interest of agent; 13 Eng. Rul. Cas. 210, on insurable interest in property.

Distinguished in *Seagrave v. Union M. Ins. Co.* L. R. 1 C. P. 305, 1 Harr. & R. 302, 35 L. J. C. P. N. S. 172, 12 Jur. N. S. 358, 14 L. T. N. S. 479, 14 Week. Rep. 690, holding unpaid vendor under incomplete contract of sale has no insurable interest.

—Of carrier or charterer.

Cited in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, holding a common carrier may lawfully obtain insurance on the goods carried against loss by the usual perils, though occasioned by the negligence of his own servants; *Munich Assur. Co. v. Dodwell*, 63 C. C. A. 152, 128 Fed. 410, holding charterer of a steamship has an insurable interest in goods in his possession as carrier; *Savage v. Corn Exch. F. & Inland Nav. Ins. Co.* 4 Bosw. 1, holding that where insurance procured by common carrier is upon his own interest alone, it may be material to inquire whether cause of loss be such that he is responsible to owner for value of goods; *Lucas v. Liverpool & L. & G. Ins. Co.* 23 W. Va. 258, 48 Am. Rep. 383; *Sheppard v. Peabody Ins. Co.* 21 W. Va. 368; *Canadian P. R. Co. v. Ottawa F. Ins. Co.* 9 Ont. L. Rep.

493; *Cunard S. S. Co. v. Marten* [1902] 2 K. B. 624, 71 L. J. K. B. N. S. 968, 87 L. T. N. S. 400, 18 Times L. R. 825, 9 Asp. Mar. L. Cas. 342,—as to ship-owner who is responsible for safe delivery of the goods having insurable interest; *Irving v. Hagerman*, 22 U. C. Q. B. 545, holding that owner of boat has insurable interest in goods in his custody on boat, as carrier.

Cited in 2 *Hutchinson*, Car. 3d ed. 865, on carrier's right to insure goods.

Apportionment of loss on parts of changing cargo.

Cited in *American Ins. Co. v. Griswold*, 14 Wend. 399, as to how loss is apportioned on loss of specific part of changing subjects of risk covered by time and valuation.

Mode of estimating loss on open policy.

Cited in note in 14 E. R. C. 446, on mode of estimating loss on open policy on goods under marine insurance contract.

Stipulation for maximum insurance on anyone of several subjects covered by one insurance.

Cited in *Hood Rubber Co. v. Atlantic Mut. Ins. Co.* 161 Fed. 788, as to meaning of proviso that only certain amount should be covered in any one boat.

13 E. R. C. 322, *MACKENZIE v. WHITWORTH*, L. R. 1 Exch. Div. 36, 45 L. J. Exch. N. S. 233, 33 L. T. N. S. 655, 24 Week. Rep. 287, affirming the decision of the Court of Exchequer, reported in 2 Asp. Mar. L. Cas. 490, L. R. 10 Exch. 142.

Insurance, effect of misrepresentation.

Cited in *Klein v. Union F. Ins. Co.* 3 Ont. Rep. 234, holding policy cannot be avoided for incumbrances unless upon the applicant's false and fraudulent answers to interrogatories.

Description of subject and risk in re-insurance contract.

Cited in *Insurance Co. of N. A. v. Hibernia Ins. Co.* 140 U. S. 565, 35 L. ed. 517, 11 Sup. Ct. Rep. 909, 48 Phila. Leg. Int. 279, holding contract need not show that it is reinsurance; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, holding in suit upon contract of the subject at risk and the loss thereof must be found in the same manner as if the original insured were the plaintiff; *Fire Ins. Asso. v. Canada F. & M. Ins. Co.* 2 Ont. Rep. 481, as to form of contract of.

Cited in note in 8 L.R.A.(N.S.) 854, on reinsurer's liability.

13 E. R. C. 335, *WEBSTER v. DE TASTET*, 4 Revised Rep. 402, 7 T. R. 157.

Insurable interest in freight or voyage.

Cited in *Orchard v. Ætna Ins. Co.* 5 U. C. C. P. 445, holding a party, being a stranger to the property in both a vessel and her cargo, cannot create an insurable interest in the freight by spontaneously advancing the amount of such freight to master or owner of vessel.

—Seaman's interest.

Cited in *May v. Delaware Ins. Co.* 19 Pa. 312, holding seamen have no insurable interest in their wages.

—Insurance on "privileges."

Distinguished in *King v. Glover*, 13 E. R. C. 336, 2 Bos. & P. N. R. 206, 9 Revised Rep. 638, holding an insurance on the "commission privileges" etc. of the captain of a ship in the African trade is legal.

Liability of agent to principal for default.

Cited in *Ainsworth v. Partillo*, 13 Ala. 460; *Austill v. Crawford*, 7 Ala. 335,—holding factor only liable for actual damage sustained; *Park v. Miller*, 27 N. J. L. 338, holding agent not liable unless principal sustains damage.

—For failure to effect insurance or other contract.

Cited in *Allen v. Suydam*, 20 Wend. 321, 32 Am. Dec. 555; *Thorne v. Deas*, 4 Johns. 84, as to right of action of principal against agent for failure of latter to insure; *Cohen v. Kittell*, L. R. 22 Q. B. Div. 680, 58 L. J. Q. B. N. S. 241, 60 L. T. N. S. 932, 37 Week. Rep. 400, 53 J. P. 469, holding right of principal to have recovered on contract essential to liability of agent for failure to contract for principal.

Cited in note in 13 Eng. Rul. Cas. 406, on liability of agent for failure to insure principal's property.

13 E. R. C. 336, *KING v. GLOVER*, 2 Bos. & P. N. R. 206, 9 Revised Rep. 638.

Insurable interest.

Cited in *Providence Washington Ins. Co. v. Bowring*, 1 C. C. A. 583, 1 U. S. App. 183, 50 Fed. 613, holding person advancing money to vessel has an insurable interest; *White v. Hudson River Ins. Co.* 7 How. Pr. 341, holding that the assignee of property of a debtor in trust to pay assignee and other creditors has an insurable interest.

13 E. R. C. 342, *COUSINS v. NANTES*, 12 Revised Rep. 696, 3 Taunt. 513.

Insurance — wagering policies.

Cited in *Alsop v. Commercial Ins. Co.* 1 Sumn. 451, Fed. Cas. No. 262, holding if both parties intend a policy on interest, and the assured has a substantial interest in the property and there is a bona fide overvaluation, the policy is good; *Hurd v. Doty*, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371, as to insurance on life of another in which person procuring the insurance had no interest being valid at common law; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507, 27 Am. Rep. 582; *Citizens' Ins. Co. v. Parsons*, 4 Can. S. C. 215; *McLellan v. North British & M. Ins. Co.* 30 N. B. 363; *Dalby v. India & L. Life Assur. Co.* 13 E. R. C. 383, 24 L. J. C. P. N. S. 2, 15 C. B. 365, 18 Jur. 1024,—as to wagering policies of marine insurance being valid at common law.

Pleading interest of insured in action on policy.

Cited in *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497, holding insured must allege his interest although he need not specify it.

Jurisdiction of court of equity to cancel policy.

Cited in *Home Ins. Co. v. Stanchfield*, 1 Dill. 424, Fed. Cas. No. 6,660, holding by later doctrine there must be some good reason to resort to equity or the parties will be left to their legal remedies.

13 E. R. C. 356, *POWLES v. INNES*, 12 L. J. Exch. N. S. 163, 11 Mees. & W. 10.

Insurance, termination of interest.

Cited in *Insurance Co. v. Trask*, 8 Phila. 36, 28 Phila. Leg. Int. 12, holding that policy covering loss by perils of sea might pass to any one who acquired

title to vessel unless restrained; *Fernandez v. Great Western Ins. Co.* 3 Robt. 457, holding a mere change of ownership of the subject insured will not avoid a policy of insurance provided there be an insurable interest at time of loss; *Mann v. Western Assur. Co.* 19 U. C. Q. B. 314, as to assignment of interest by partner destroying policy; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507, 27 Am. Rep. 582; *Davies v. Home Ins. Co.* 3 U. C. Err. & App. 269; *Davies v. Home Ins. Co.* 24 U. C. Q. B. 364,—as to effect of assignment of property on insurance; *Re West Norfolk Lumber Co.* 112 Fed. 759; *The City of Norwich (Place v. Norwich & N. Y. Transp. Co.)* 118 U. S. 468, 30 L. ed. 134, 6 Sup. Ct. Rep. 1150; *North of England Oil Cake Co. v. Archangel Maritime Ins. Co.* 13 E. R. C. 360, L. R. 10 Q. B. 249, 44 L. J. Q. B. N. S. 121, 32 L. T. N. S. 561, 24 Week. Rep. 162, 2 Asp. Mar. L. Cas. 571, holding when interest of assured is assigned the policy drops.

Cited in note in 37 L.R.A. 150, on rights of vendor and vendee to proceeds of insurance.

—Suit by assignee or by assignor to use of assignee.

Cited in *Sanders v. Hillsborough Ins. Co.* 44 N. H. 238, as to action being maintainable by assignor for benefit of assignee; *Duncan v. China Mut. Ins. Co.* 27 Jones & S. 396, holding that the holder of a marine insurance policy by assignment from one who sells an insured vessel to another may maintain an action upon the policy for the benefit of the buyer to the extent of the latter's insurable interest; *Walker v. Firemen's Ins. Co.* 2 Handy (Ohio) 256; *Shaw v. Phenix Ins. Co.* 20 U. C. C. P. 170; *Bank of Hamilton v. Western Assur. Co.* 38 U. C. Q. B. 609,—as to person assigning interest before loss not being entitled to sue on policy except as trustee; *Lloyd v. Fleming*, L. R. 7 Q. B. 299, 41 L. J. Q. B. N. S. 93, 25 L. T. N. S. 824, 20 Week. Rep. 296, 1 Asp. Mar. L. Cas. 192, holding a policy of marine insurance can be assigned under statute after loss, so as to entitle the assignee to sue upon in his own name; *Watson v. Swann*, 2 E. R. C. 346, 31 L. J. C. P. N. S. 210, 11 C. B. N. S. 756, as to right of person assigning interest to sue as trustee for purchaser.

Rights of buyer or assignee of insured goods.

Cited in *Savage v. Howard Ins. Co.* 44 How. Pr. 40, as to vendor standing as trustee for vendee after sale of property insured; *Rayner v. Preston*, L. R. 18 Ch. Div. 1, 50 L. J. Ch. N. S. 472, 44 L. T. N. S. 787, 29 Week. Rep. 546, 45 J. P. 829, holding purchaser who had completed contract after loss not entitled to insurance money as against vendor.

Cited in *Hollingsworth*, Contr. 296, on impossibility of acquiring rights under contract to which one was not a party.

—Proof of insurance by mortgagee for benefit of himself and mortgagor.

Cited in *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497, as to fact being proved by parol.

—Assignment of policy.

Cited in *Crozier v. Phenix Ins. Co.* 13 N. B. 200, holding until assented to transfer will give no interest in the policy; *Manning v. Bowman*, 9 N. S. 42, as to verbal assignment giving assignee equitable right to proceeds.

—Divisibility of stipulations in policy.

Cited in *Burton v. Gore Dist. Mut. F. Ins. Co.* 12 Grant, Ch. (U. C.) 156, as to them being divisible for many purposes.

- 13 E. R. C. 360, NORTH OF ENGLAND OIL CAKE CO. v. ARCHANGEL MARITIME INS. CO. 2 Asp. Mar. L. Cas. 571, 44 L. J. Q. B. N. S. 121, L. R. 10 Q. B. 249, 32 L. T. N. S. 561, 24 Week. Rep. 162.

Assignability of insurance policies.

Cited in *Bank of Hamilton v. Western Assur. Co.* 38 U. C. Q. B. 609, as to marine policy being assignable so assignee might sue in own name.

Cited in note in 37 L.R.A. 150, on rights of vendor and vendee to proceeds of insurance.

- 13 E. R. C. 366, *INGLIS v. STOCK*, L. R. 10 App. Cas. 263, 5 Asp. Mar. L. Cas. 422, 54 L. J. Q. B. N. S. 582, 52 L. T. N. S. 821, 33 Week. Rep. 877, affirming the decision of the Court of Appeal, reported in L. R. 12 Q. B. Div. 564, 53 L. J. Q. B. N. S. 356, 51 L. T. N. S. 449, 5 Asp. Mar. L. Cas. 294, which reverses the decision of Field, J., reported in L. R. 9 Q. B. Div. 708, 52 L. J. Q. B. N. S. 30, 47 L. T. N. S. 416, 31 Week. Rep. 455, 4 Asp. Mar. L. Cas. 596.

Insurable interest.

The decision of the Court of Appeal was cited in *Law v. British American L. Ins. Co.* 23 N. S. 537, holding that one who advances money for expenditures in fitting out vessel for voyage, has insurable interest.

Title in sales of goods to be shipped on bill of lading to order of seller.

Cited in *Hamilton v. Jos. Schlits Brewing Co.* 129 Iowa, 172, 2 L.R.A.(N.S.) 1078, 105 N. W. 438, holding the prima facie conclusion that vendor reserves the *jus disponendi*, when the bill of lading is to his order, may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property.

Passage of title to goods sold.

Cited in *Graham v. Laird Co.* 20 Ont. L. Rep. 11, on question as to when property vests in purchaser and as to right to inspect.

Cited in notes in 26 L.R.A.(N.S.) 10, on sufficiency of selection or designation of goods sold out of larger lot; 62 L.R.A. 801, 803, on effect of contract to ship goods *f. o. b.*

The decision of the Court of Appeal was cited in *Pullman's Palace Car Co. v. Metropolitan Street R. Co.* 157 U. S. 94, 39 L. ed. 632, 15 Sup. Ct. Rep. 503, holding that title to cars purchased and agreed to be inspected and accepted at manufacturer's works and delivered free on board cars, passed to purchaser on such inspection.

— Passage of title upon delivery.

Cited in note in 22 L.R.A. 417, 422, on passing of title by delivery to carrier for transportation to consignee or vendee.

The decision of the Court of Appeal was cited in *A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co.* 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670, holding that if contract provides that delivery shall be made at certain place, then vendor's title is not divested until delivery is made.

Meaning of phrase "free on board."

The decision of the Court of Appeal was cited in *Foxton v. Hamilton Steel & I. Co.* 1 Ont. L. Rep. 393, to the point expression "Free on board" means that goods put on board, under contract using such expression, are at risk of buyer.

13 E. R. C. 383, *DALBY v. INDIANA & L. LIFE ASSUR. CO.* 15 C. B. 365, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. N. S. 2, 3 Week. Rep. 116.

Nature of life insurance contract.

Cited in *Bird v. Penn. Mut. L. Ins. Co.* 11 Phila. 485, 33 Phila. Leg. Int. 54, 2 W. N. C. 410, Fed. Cas. No. 1,430, on nature of fire insurance contract; *Exchange Bank v. Loh*, 104 Ga. 446, 44 L.R.A. 372, 31 S. E. 459; *Campbell v. Supreme Conclave*, 1 O. H. 66 N. J. L. 274, 54 L.R.A. 576, 49 Atl. 550; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501,—to the point that contract of life insurance is not one merely of indemnity for pecuniary loss; *Whiting v. Independent Mut. Ins. Co.* 15 Md. 297 (dissenting opinion), on marine insurance as contract of indemnity; *Robert v. New England Mut. Ins. Co.* 2 Disney (Ohio) 106, holding that policies of life insurance are contracts of indemnity, but agreements to pay prescribed sum, if person whose life is insured shall die within time for which risk was taken; *Beckett v. Grand Trunk R. Co.* 8 Ont. Rep. 601; *Lightbound v. Warnock*, 4 Ont. Rep. 187,—holding that contract of life insurance, is contract to pay certain sum of money on death of person, in consideration of due payment of certain annuity for his life; *Elliott's Appeal*, 22 Phila. Leg. Int. 260, on contract of life insurance not being one of indemnity but one to pay a certain sum of money upon the death of a person, in consideration of the payment of a certain annuity for his life; *Long v. Ancient Order United Workmen*, 25 Ont. App. Rep. 147, holding that contract of life insurance is regarded as single or entire contract for life, liable to be defeated, if premiums are not paid; *Potter v. Rankin*, 1 E. R. C. 71, L. R. 3 C. P. 562, L. R. 5 C. P. 341, 39 L. J. C. P. N. S. 147, as to it not being contract of indemnity.

Cited in *Hollingsworth*, Contr. 230, on nature of life insurance contract.

Insurance for benefit irrespective of indemnity.

Cited in *Bradburn v. Great Western R. Co.* 8 E. R. C. 439, L. R. 10 Exch. 1, 44 L. J. Exch. N. S. 9, 31 L. T. N. S. 464, 23 Week. Rep. 48, holding insured entitled to retain benefit of insurance in addition to amount recovered for damages for tort.

Fire insurance policy as contract of indemnity.

Cited in *Citizens' Ins. Co. v. Parsons*, 4 Can. S. C. 215, holding that contract of fire insurance is one of indemnity, and statute regulating conditions in contract is not one regulating trade and commerce; *Bank of Hamilton v. Western Assur. Co.* 38 U. C. Q. B. 609, holding that contract of fire insurance is contract of indemnity; *Davies v. Home Ins. Co.* 24 U. C. Q. B. 364, to the point that fire insurance policy is mere contract of indemnity to assured for loss sustained by one or more of casualties insured against.

Insurable interest in another's life.

Cited in *Loomis v. Eagle Life & Health Ins. Co.* 6 Gray, 396, holding that father has insurable interest in life of minor son; *Rittler v. Smith*, 70 Md. 261, 2 L.R.A. 844, 16 Atl. 890, holding that creditor has insurable interest in life of his debtor; *Martin v. Franklin F. Ins. Co.* 38 N. J. L. 140, 20 Am. Rep. 372, to the point that interest in life insured is not necessary to give validity to policy of life insurance; *Reed v. Provident Sav. L. Assur. Soc.* 190 N. Y. 111, 82 N. E. 734, holding that insurable interest existed where nephew under agreement between assured and his children paid premiums and was to be reimbursed out of policy for premiums paid; *Miller v. Eagle Life & Health Ins. Co.* 2 E. D. Smith, 268, holding that one who furnished money to buy outfit for another to go to California, under agreement that former would have one-half of profits arising from gold digging and other employments by latter, had insurable interests; *Scott v. Dickson*, 108 Pa. 6,

56 Am. Rep. 192, 42 Phila. Leg. Int. 362, 16 W. N. C. 181, holding that man may insure his own life, paying premium himself, for benefit of another, who has not insurable interest; *Packard v. Connecticut Mut. L. Ins. Co.* 9 Mo. App. 469; *North American Life Assur. Co. v. Craigen*, 18 N. S. 440,—as to necessity of an insurable interest at common law; *Hurd v. Doty*, 86 Wis. 1, 21 L.R.A. 746, 56 N. W. 371, holding that statute of 14 Geo. III. chap. 48, prohibiting life insurance in favor of those who have no insurable interest in life of insured was never in force here.

Disapproved in *Exchange Bank v. Loh*, 104 Ga. 446, 44 L.R.A. 372, 31 S. E. 459, holding a creditor has, for the purpose of indemnifying himself against loss, but for no other purpose, an insurable interest in the life of his debtor.

—Effect of cessation of.

Cited in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *Ferguson v. Massachusetts Mut. L. Ins. Co.* 32 Hun, 306; *Rawls v. American Mut. L. Ins. Co.* 27 N. Y. 282, 84 Am. Dec. 280; *Corson's Appeal*, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213, 18 W. N. C. 349; *Manhattan L. Ins. Co. v. Hennessy*, 39 C. C. A. 625, 99 Fed. 64; *Sides v. Knickerbocker L. Ins. Co.* 16 Fed. 650,—holding that cessation of insurable interest will not release insurer from liability under life insurance policy; *Waldheim v. John Hancock Mut. L. Ins. Co.* 8 Misc. 506, 28 N. Y. Supp. 766, holding that where life insurance is procured by husband, payable to his wife, and she dies before husband, proceeds do not go to her personal representatives; *Bunnell v. Shilling*, 28 Ont. Rep. 336, to the point that life insurance policy issued in favor of creditor on life of debtor, if valid when issued is not made void by subsequent cessation of insurable interest.

Cited in Benjamin, Sales, 5th ed. 96, on inference of new contract from conduct of parties.

Right of assignee of insurance policy to recover thereon.

Cited in *Mutual L. Ins. Co. v. Allen*, 138 Mass. 24, 52 Am. Rep. 245; *Murphy v. Red*, 64 Miss. 614, 60 Am. Rep. 68, 1 So. 761; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Crosswell v. Connecticut Indemnity Assn.* 51 S. C. 103, 28 S. E. 200; *Nye v. Grand Lodge, A. O. U. W.* 9 Ind. App. 131, 36 N. E. 429,—holding that where policy of life insurance is valid in inception it may be assigned to one not having interest in life of insured; *Emerick v. Coakley*, 35 Md. 188, holding that assignment by wife and her husband, for benefit of his creditors, of policy of insurance on his life, obtained for her sole and separate use, is valid; *Fitzgerald v. Rawlings*, 114 Md. 470, 79 Atl. 915, Ann. Cas. 1912A, 650, holding that assignment of policy of life insurance to one to whom insured is indebted, is valid although policy was procured in pursuance of agreement to make assignment if further advances were made by assignee; *Clay's Appeal*, 50 Pa. 75, holding that assignment of policies of life insurance by debtor who was insolvent when insured in trust for benefit of wife, is fraudulent and void as to creditors.

Effect of invalid assignment on liability of insurer.

Cited in *Russell v. Grigsby*, 94 C. C. A. 61, 168 Fed. 577, holding that where life insurance policy was valid when issued, fact that assignment thereof to one having no insurable interest was invalid did not affect liability of insurer.

Assignment of policy to one having no insurable interest.

Cited in *Olmsted v. Keyes*, 85 N. Y. 593, holding that policy of life insurance may be assigned to one having no insurable interest.

Invalidity of gaming contracts.

Cited in Benjamin, Sales, 5th ed. 536, on invalidity of gaming contracts.

13 E. R. C. 401, *SMITH v. LASCELLES*, 1 Revised Rep. 457, 2 T. R. 187.

Liability of merchant for failure to insure goods of customer according to custom.

Cited in *Port Huron Engine & Thresher Co. v. McGregor*, 103 Tex. 529, 131 S. W. 398, holding that rice milling company, which during course of dealing for years with customer, had charged two cents per sack for insurance, without explanation, was presumed to have undertaken to have insured it for full value and was liable to customer to that amount for its loss by fire.

Duty of correspondent or consignee of goods ordered to be insured.

Cited in *Thorne v. Deas*, 4 Johns. 84; *Room v. Large*, 1 Has. & War. (Pr. Edw. Isl.) 310,—as to when correspondent must obey order.

— Damages recoverable against agent for failure to insure.

Cited in *Beardsley v. Davis*, 52 Barb. 159, holding in an action against an agent, for negligence in not procuring full insurance, the measure of damages is the value of the property insured, less amount received under partial insurance.

Insurable interest in mortgagors and mortgagees.

Cited in *Higginson v. Dall*, 13 Mass. 96, as to right of mortgagor and mortgagee to take insurance severally; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81; *Ogden v. Montreal Ins. Co.* 3 U. C. C. P. 497; *Turner v. Liverpool Docks*, 4 E. R. C. 725, 6 Exch. 543, 570, 20 L. J. Exch. N. S. 393-400,—as to mortgagor having such interest; *Richardson v. Home Ins. Co.* 21 U. C. C. P. 291, holding mortgagee of a vessel, who was alone named in a policy, without any general words, or other indication of interest in any other person, but who had in fact, insured the mortgagor's interest also, as disclosed to insurers at the time, could recover whole amount so insured.

Ratification by principal of acts of agent.

Cited in *Silverman v. Bush*, 16 Ill. App. 437, holding if principal ratifies and adopts his agent's acts even for a moment he is bound by them; *Doyle v. Teas*, 5 Ill. 202; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Metcalf v. Williams*, 144 Mass. 452, 11 N. E. 700; *Marshall v. Hann*, 17 N. J. L. 425; *Codwise v. Hacker*, 1 Caines, 526,—as to when principal bound.

Agent binding principal by acts within ostensible authority.

Cited in *Landsdale v. Shackelford*, Walk. (Miss.) 149, holding that act of general agent within limits of his ostensible powers, binds principal.

13 E. R. C. 407, *POWER v. BUTCHER*, 10 Barn. & C. 329, 8 L. J. K. B. N. S. 217, 5 Mann. & R. 327.

Liability of insurance agents for premiums on sea policies.

Cited in *Universe Ins. Co. v. Merchants' M. Ins. Co.* [1897] 2 Q. B. 93, 66 L. J. Q. B. N. S. 564, 76 L. T. N. S. 748, 45 Week. Rep. 625, holding the rule of law by which broker and not assured is liable to underwriter for premium upon a policy of marine insurance is not limited to ordinary form of Lloyd's policy, but extends also to policy which contains a promise by assured to pay the premium.

Cited in note in 38 L.R.A.(N.S.) 620, on insurance brokers as agent for the insured.

Sufficiency of payment of premiums to insurance agent.

Cited in *Xenos v. Wickham*, 13 E. R. C. 422, 33 L. J. C. P. N. S. 13, 36 L. J. C. P. N. S. 313, 14 C. B. N. S. 452, L. R. 2 H. L. 296, 16 L. T. N. S. 800, 16 Week. Rep. 38, holding payment to broker payment to company.

Action for money paid.

Cited in *Williams v. McGehee*, 2 Fla. 58, holding that count for money paid for another cannot be maintained without proving actual payment; *Pitzer v. Harmon*, 8 Blackf. 112, 44 Am. Dec. 738; *Whiting v. Aldrich*, 117 Mass. 582; *Lord v. Staples*, 23 N. H. 448,—holding it cannot be maintained without actual payment; *Parker v. Parker*, 32 U. C. C. P. 113, as to necessity of actual payment in order to maintain the count.

— Giving bill or note as payment.

Cited in *Boulware v. Robinson*, 8 Tex. 327, 58 Am. Dec. 117, as to distinction between giving by plaintiff a bill of exchange or negotiable note, which has been accepted by creditor in satisfaction of defendant's debt, and the giving of bond or other security not negotiable which has been in a like manner accepted; *Dickie v. Blenkhorn*, 15 N. S. 387, holding where plaintiff's assignor gave his promissory note for amount of premium of a policy of marine insurance on a vessel of which said assignor and the defendant were part owners and the note was never paid and the policy stipulated that in event of the premium not being paid, the company might cancel it, plaintiff as assignee in bankruptcy could not bring action against defendant for his share of premium, as money paid.

Distinguished in *McVicar v. Royce*, 17 U. C. Q. B. 529, holding where defendant was indebted to plaintiff and third party had been surety for defendant and all agreed that surety should release defendant and plaintiff should give him a mortgage to secure amount due from defendant, the plaintiff could maintain action against defendant without paying mortgage due surety.

Bill of particulars.

Cited in *Robinson v. Allison*, 36 Ala. 525, as to absence of surprise from evidence being a reason for denying new trial on ground of deficient bill.

13 E. R. C. 420, *BOUSFIELD v. CRESWELL*, 2 Campb. 545, 11 Revised Rep. 794.

Duty of agent to principal respecting payment by or solvency of obligors to principal.

Distinguished in *Hamilton v. Cunningham*, 2 Brock. 350, Fed. Cas. No. 5,978; *Elliott v. Walker*, 1 Rawle, 126,—holding agent selling cargo not responsible for solvency of purchasers.

— Insurance agent.

Cited in *Harvey v. Turner*, 4 Rawle, 223, holding he is bound to give his principal earliest notice of insolvency of underwriters; *Williams, T. & Co. v. Knight*, 13 E. R. C. 456, [1894] P. 342, 64 L. J. Prob. N. S. 15, 71 L. T. N. S. 92, holding it not his duty to sue on policy.

13 E. R. C. 422, *XENOS v. WICKHAM*, 33 L. J. C. P. N. S. 13, 36 L. J. C. P. N. S. 313, 14 C. B. N. S. 452, L. R. 2 H. L. 296, 16 L. T. N. S. 800, 16 Week. Rep. 38.

Insurance, formation and completion of the contract.

Cited in *Armstrong v. Provident Sav. Life Assur. Soc.* 2 Ont. L. Rep. 771, holding the initialing of an application for insurance by officers of an insurance company though indicating acceptance of the risk, does not without communication of the fact to the applicant constitute any contract with him; *Hyndman v. Montreal Ins. Co.* 2 Has. & War. (Pr. Edw. Isl.) 132, as to ship being contract for insurance; *Fisher v. Liverpool M. Ins. Co.* L. R. 8 Q. B. 469, 42 L. J. Q. B. N. S. 224, 28 L. T. N. S. 867, as to initialed ship not being memorandum of insurance;

Cory v. Patton, L. R. 7 Q. B. 304, 41 L. J. Q. B. N. S. 195 note, 26 L. T. N. S. 161, 20 Week. Rep. 364, 2 Asp. Mar. L. Cas. 302, holding under statute contract made by underwriters by initialing a ship a valid and binding contract.

Cited in 2 Page, Contr. 912, on when policy takes effect; *Smith*, Pers. Prop. 227, on consummation of contract of insurance.

—Delivery of policy.

Cited in *Union Cent. L. Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190; *Trager v. Louisiana Equitable L. Ins. Co.* 31 La. Ann. 235,—as to policy being binding although remaining in possession of insurers; *Delaware State F. & M. Ins. Co. v. Shaw*, 54 Md. 546; *Empire Brewing & Malting Co. v. Harley*, 7 Manitoba L. Rep. 416; *Confederation Life Assn. v. O'Donnell*, 10 Can. S. C. 92,—as to what constitutes; *Baldwin v. Chouteau Ins. Co.* 56 Mo. 151, 17 Am. Rep. 671; *Going v. Mutual Ben. L. Ins. Co.* 58 S. C. 201, 36 S. E. 556; *Elson v. North American Life Assur. Co.* 9 B. C. 474; *McFarlane v. Andes Ins. Co.* 20 Grant, Ch. (U. C.) 486; *O'Donnell v. Confederation Life Ins. Co.* 14 N. S. 231,—holding assured need not take away policy to make delivery complete; *Buck v. Knowlton*, 31 N. B. 417; *Morrison v. Universal M. Ins. Co.* L. R. 8 Exch. 40, 197, 42 L. J. Exch. N. S. 115, 21 Week. Rep. 774, 1 Asp. Mar. L. Cas. 503,—as to policy being his property as soon as executed; *McFarlane v. Andes Ins. Co.* 20 Grant, Ch. (U. C.) 486, holding that policy of fire insurance signed by president and secretary of company and sent to and signed by local agent and ready for delivery must be deemed delivered.

Distinguished in *Western Assur. Co. v. Provincial Ins. Co.* 5 Ont. App. Rep. 190, holding where company believed premium to have been paid when it was not the delivery of policy to agent did not bind them; *Millville Mut. M. & F. Ins. Co. v. Collerd*, 38 N. J. L. 480, holding where policy of insurance is sent to assured by a messenger, and he refuses to accept it and pay the premium according to its terms and his agreement, but holding it to look into the standing of the company while it is under advisement without delivery, acceptance and payment of premium, the property is at the risk of assured.

Liability of insurance agent for premium.

Cited in *Bullen v. Sharp*, L. R. 1 C. P. 86, 35 L. J. C. P. N. S. 105, 12 Jur. N. S. 247, 14 L. T. N. S. 72, 14 Week. Rep. 338, 1 Harr. & R. 117, as to his liability for; *Universe Ins. Co. v. Merchants' M. Ins. Co.* [1897] 2 Q. B. 93, 66 L. J. Q. B. N. S. 564, 76 L. T. N. S. 748, 45 Week. Rep. 625, holding broker liable on policy which contains promise by assured to pay the premium.

Cited in note in 13 Eng. Rul. Cas. 418, on liability of insurance broker to insurer for premiums.

Authority of insurance agent.

Cited in *Hamilton v. Phoenix Ins. Co.* 106 Mass. 395, as to his authority.

—Power of agent to cancel or alter policy.

Cited in *McCrea v. Waterloo County Mut. F. Ins. Co.* 1 Ont. App. Rep. 218, as to the company only having the power; *Hendrickson v. Queen Ins. Co.* 30 U. C. Q. B. 108, holding he has no implied power.

Distinguished in *Jones v. Tayler*, 15 N. B. 391, holding delivery of contract to one acting as agent for insurer and not assured did not bind company.

Implied authority to cancel agreement.

Cited in *Pope v. Crown Lands Comr.* 1 Has. & War. (Pr. Edw. Isl.) 414; *Palm-er v. Ocean M. Ins. Co.* 29 N. B. 501; *Farquhar v. Billman*, 40 N. S. 289; *Atty.*

Gen. ex rel. Mackintosh v. Halifax, 36 N. S. 177,—as to none being implied from authority to enter into an agreement.

Execution and constructive delivery of deed without manual tradition.

Cited in Hockett v. Jones, 70 Ind. 227, holding that placing instrument in son's hands to be delivered at maker's death to other party was sufficient; Jones v. Swayze, 42 N. J. L. 279, holding a delivery of a deed to a third person for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effective from the instant of such delivery; Dietz v. Farish, 12 Jones & S. 190, holding that grantee's possession will not constitute delivery of deed where such possession was given by grantor for special purpose; Fain v. Smith, 14 Or. 82, 58 Am. Rep. 281, 12 Pac. 365, holding that intention to pass title and make deed presently binding on grantor is controlling element when there are circumstances which go to make out delivery; Huggard v. Ontario & S. Land Co. 1 Sask. L. R. 526, holding that delivery is entirely matter of intention on part of party executing deed, and actual delivery to party taking under it is not essential; Youill v. White, 5 Terr. L. R. 275, as to promise made by deed being irrevocable even before its acceptance; Blackwell v. Blackwell, 196 Mass. 186, 81 N. E. 910, 12 Ann. Cas. 1070; Nelson Coke & Gas Co. v. Pellatt, 4 Ont. L. Rep. 481; Doe ex dem. Chiverie v. Knight, 1 Has. & War. (Pr. Edw. Isl.) 448; Kelly v. Imperial Loan & Invest. Co. 11 Ont. App. Rep. 526; Zwicker v. Zwicker, 29 Can. S. C. 527,—holding the fact that a deed, after it has been signed and sealed by grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument; Vaughan v. Godman, 94 Ind. 191; Stephens v. Beatty, 27 Ont. Rep. 75; Trust & Loan Co. v. Covert, 32 U. C. Q. B. 222; Babington v. O'Connor, Ir. L. R. 20 C. L. 246, as to what constituted delivery; Re French, Ir. L. R. 21 Eq. 283, as to whom estopped to deny delivery.

Cited in note in 8 Eng. Rul. Cas. 593, on taking effect of deed from date of execution.

Distinguished in Brown v. Brown, 66 Me. 316, holding the commitment of a deed to a third person with the reservation of the right on the part of the grantor to withdraw it any time before his death, and in case it was not so withdrawn, to be retained till death of grantor and then to be delivered to grantee, no legal delivery; Dietz v. Farish, 79 N. Y. 520, holding where parties agreed that title should be approved before contract was consummated there was no delivery until such approval.

Revocation of agreement.

Cited in Gaar Scott Co. v. Ottoson, 21 Manitoba L. Rep. 462, holding that order under seal for supply of goods is not revocable before acceptance as ordinary order might be; Waterous Engine Works Co. v. Pratt, 30 Ont. Rep. 538, holding a contract sealed and delivered by one party, which is subject to the approval of the other party cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent.

Cited in 1 Page, Contr. 64, as to what offers are irrevocable.

Adherence to references of fact.

Cited in Trust & L. Co. v. Rutan, 1 Can. S. C. 564 (dissenting opinion); Trust & L. Co. v. Covert, 1 Ont. App. Rep. 26,—as to it being better than to attempt to remedy the inconvenience of a negligent mode of doing business, by making the facts bend to the exigencies of negligence.

13 E. R. C. 456, *WILLIAMS T. & CO. v. KNIGHT* [1894] P. 342, 64 L. J. Prob. Div. N. S. 15, 71 L. T. N. S. 92.

13 E. R. C. 467, *MOTTEUX v. LONDON ASSUR. CO.* 1 Atk. 545.

Liability of insurer before policy is issued.

Cited in *Rowe v. London & L. F. Ins. Co.* 12 Grant, Ch. (U. C.) 311, on the liability of the company after application made before policy is issued.

— Policy issued after loss has occurred.

Cited in *Tayloe v. Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187, holding that where the loss occurred while the letter accepting the terms of insurance was on its way to the company, the company could be compelled to issue a policy; *Hickey v. Anchor Assur. Co.* 18 U. C. Q. B. 433, on the issuance of a policy after loss has occurred.

Jurisdiction of court of equity to reform written instruments.

Cited in *Ivinson v. Hutton*, 98 U. S. 79, 25 L. ed. 66, on the reformation of a contract to conform to the intent of the parties; *Wyche v. Greene*, 11 Ga. 159, holding that where through mistake the instrument does not obtain the object intended a court will reform it to fulfil the parties' intentions; *Worley v. Tuggle*, 4 Bush, 168, holding that the chancellor had jurisdiction to reform a deed to make it conform to the parties' agreement; *Loss v. Obry*, 22 N. J. Eq. 52, holding that a court of equity has jurisdiction to reform mistakes in deeds; *Montague v. Smith*, 13 Mass. 396; *Gower v. Sterner*, 2 Whart. 75,—on the jurisdiction of a court of equity to reform a written instrument.

Reformation of mistake in policy of insurance.

Cited in *Andrews v. Essex F. M. Ins. Co.* 3 Mason, 6, Fed. Cas. No. 374, on the jurisdiction of a court of equity to reform a contract of insurance; *Hearn v. Equitable Safety Ins. Co.* 4 Cliff. 192, Fed. Cas. No. 6,300; *Oliver v. Mutual Commercial Marine Ins. Co.* 2 Curt. 277, Fed. Cas. No. 10,498,—holding that if through mistake the party fails to obtain the policy he is entitled to by an existing valid contract, equity will reform it; *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248, on the reformation of a policy; *Lyman v. United Ins. Co.* 17 Johns. 373, holding that court will not amend written contract of insurance without the clearest and most satisfactory proof of mistake and of real agreement; *Phoenix Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 431, holding that a court has the same jurisdiction to reform a policy of insurance as it has any written instrument; *Moliere v. Pennsylvania F. Ins. Co.* 5 Rawle, 342, 28 Am. Dec. 675, holding that a policy would be reformed to conform with the verbal description given the insurers; *Norris v. Insurance Co. of N. A.* 3 Yeates, 84, 2 Am. Dec. 360, on the reformation of a policy of insurance; *Elstner v. Cincinnati Equitable Ins. Co.* 1 Disney (Ohio) 412, holding that a court of equity would reform a policy to conform to the actual agreement of the parties; *Griffiths v. Fleming* [1909] 1 K. B. 805, 2 B. R. C. 391, 78 L. J. K. B. N. S. 567, 100 L. T. N. S. 765, 25 Times L. R. 377, 53 Sol. Jo. 340; *Liverpool & L. & G. Ins. Co. v. Wyld*, 1 Can. S. C. 604,—to the point that if there is agreement for policy of particular form, and policy issued is different, court of equity may deal with case upon footing of agreement and not of policy; *Wylde v. Union M. Ins. Co.* Russell (N. S.) 203, on label as controlling where policy differs therefrom, so that reformation of policy may be had; *Banks v. Wilson*, Russell (N. S.) 210, holding that a court of equity will reform a policy of insurance to make it correspond with the agreement of the parties.

—After loss has occurred.

Cited in *Wylde v. Union M. Ins. Co.* 10 N. S. 205 (affirming *Russell Eq. (N. S.)* 203), holding that application to rectify a policy was not made too late if made after loss has occurred.

Waiver of mistake or fraud by retention of policy.

Cited in note in 67 L.R.A. 723, on retention of policy as waiver of mistake or fraud of insurer or its agent.

Meaning of words "at" and "from" in insurance policy.

Cited in *Steinback v. Rhinelander*, 3 Johns. Cas. 269, on the meaning of the words "at and from" in a policy; *Haughton v. Empire M. Ins. Co.* 23 Phila. Leg. Int. 189, holding that the words "at and from" in a marine insurance policy are to be taken in their geographical sense, and that a vessel first arrives at a port when she enters its harbor; *St. Paul F. & M. Ins. Co. v. Troop*, 26 Can. S. C. 5, holding that the words, "at and from" as used in a policy of marine insurance meant, at and from the first arrival; *Haughton v. Empire M. Ins. Co.* L. R. 1 Exch. 206, 4 Hurlst. & C. 41, 35 L. J. Exch. N. S. 117, 12 Jur. N. S. 376, 15 L. T. N. S. 80, 14 Week. Rep. 645, holding that the words "at and from" made the policy attach from the first arrival, whether the ship was as yet safely moored.

Cited in note in 13 Eng. Rul. Cas. 616, 617, on construction of policy insuring ship for voyage "at and from" specified foreign port.

—Delay in sailing as affecting company's liability.

Cited in *Augusta Ins. & Banking Co. v. Abbot*, 12 Md. 348, on a delay in sailing as releasing company from liability.

Right of shipmaster to have ship repaired.

Cited in *Cruder v. Philadelphia Ins. Co.* 2 Wash. C. C. 262, Fed. Cas. No. 3,453, holding that if the vessel be disabled and goes to the nearest available port for repairs, the insurance remains as before; *Taylor v. Lowell*, 3 Mass. 331, 3 Am. Dec. 141, holding that necessity of repairs must be in contemplation of parties, and every unavoidable delay occasioned thereby, is constructively permitted in contract of marine insurance; *Sherman v. Inman* S. S. Co. 26 Hun, 107, holding that where a ship has received such an injury that it can not proceed to its port of discharge, it may go to the nearest available port for repairs; *Phelps, James & Co. v. Hill* [1891] 1 Q. B. 605, 60 L. J. Q. B. N. S. 382, 64 L. T. N. S. 610, 7 Asp. Mar. L. Cas. 42, on the effect upon insurance of a necessary deviation from proper course of voyage.

Suit in equity by cestui que trust.

Cited in *Hayward v. Andrews*, 106 U. S. 672, 27 L. ed. 271, 1 Sup. Ct. Rep. 544, on the right of an assignee of a chose in action to come into equity to enforce his rights; *Gibson v. Love*, 5 Fla. 217, holding that to enable a cestui que trust to claim the jurisdiction of a court of equity to assert a legal title, it must be alleged that the trustee refused the use of his name in an action at law.

Suit on policy by person beneficially insured.

Cited in *Western Assur. Co. v. Ward*, 21 C. C. A. 378, 41 U. S. App. 443, 75 Fed. 338; *Union Cent. L. Ins. Co. v. Phillips*, 41 C. C. A. 263, 102 Fed. 19; *Continental L. Ins. Co. v. Webb*, 54 Ala. 688,—on the right of a beneficiary under an insurance policy to sue in equity where policy is in hands of third persons; *Walker v. Brooks*, 125 Mass. 241, on the right of an agent to sue in a court of equity upon a policy taken in the name of the principal.

Cited in *Smith Eq. Rem.* 41, on right to maintain bill in equity because assignee of legal right cannot sue in his own name.

Adequate remedy at law as defeating right to specific performance.

Cited in *Sullivan v. Leer*, 2 Colo. App. 141, on remedy at law defeating specific performance.

13 E. R. C. 471, *IONIDES v. PACIFIC F. & M. INS. CO.* 1 Asp. Mar. L. Cas. 330, 26 L. T. N. S. 738, L. R. 7 Q. B. 517, 21 Week. Rep. 22, affirming the decision of the Court of Queen's Bench, reported in 41 L. J. Q. B. N. S. 33, 190, L. R. 6 Q. B. 674, 25 L. T. N. S. 490.

Slip of policy as policy of insurance.

Cited in *Home M. Ins. Co. v. Smith* [1898] 1 Q. B. 829, 67 L. J. Q. B. N. S. 554, 8 Asp. Mar. L. Cas. 386, 3 Com. Cas. 172, 78 L. T. N. S. 465, 14 Times L. R. 366, on a slip of policy as a policy of insurance within the meaning of the stamp act.

The decision of the court of Queen's Bench was cited in *General M. Ins. Co. v. Ocean M. Ins. Co.* Rap. Jud. Quebec 16 C. S. 170, holding that the interim covering memorandum constituted a valid contract of insurance as containing all the elements of a policy; *Citizens' Ins. Co. v. Parsons*, L. R. 7 App. Cas. 96, 51 L. J. P. C. N. S. 11, 45 L. T. N. S. 721, on the interim notes preliminary to insurance as policies under the act prescribing conditions to be inserted in policy; *Fisher v. Liverpool M. Ins. Co.* L. R. 8 Q. B. 469, 42 L. J. Q. B. N. S. 224, 28 L. T. N. S. 867, holding that no action could be maintained upon a slip where no stamped policy had been issued; *Wylde v. Union M. Ins. Co.* Russell (N. S.) 203, on slip as being final contract of insurance.

Innocent misrepresentation of material fact as vitiating policy of insurance.

Cited in *Wyld v. London & L. & G. Ins. Co.* 33 U. C. Q. B. 284, on the alteration of the premises after the application as affecting the insurance; *Lishman v. Northern M. Ins. Co.* L. R. 10 C. P. 179, 44 L. J. C. P. N. S. 195, 32 L. T. 170, 23 Week. Rep. 733, 2 Asp. Mar. L. Cas. 504, holding that a concealment of the loss after the acceptance of the risk but before the policy was issued was not a concealment of a material fact so as to vitiate the policy.

Distinguished in *Redford v. Mutual F. Ins. Co.* 38 U. C. Q. B. 538, holding a mere statement of an opinion which is in fact erroneous, does not vitiate a policy.

The decision of the Court of Queen's Bench was cited in *Nova Scotia M. Ins. Co. v. Stevenson*, 23 Can. S. C. 137, holding that a misstatement of the age of a vessel, is a misrepresentation of a material fact; *Connely v. Guardian Assur. Co.* 30 N. B. 316, on the effect of a mistake in the description of the insured property; *Cory v. Patton*, L. R. 7 Q. B. 304, 41 L. J. Q. B. N. S. 195 note, 26 L. T. N. S. 161, 20 Week. Rep. 364, 2 Asp. Mar. L. Cas. 302, holding that the non-communication of material facts occurring after the final acceptance of the risk, does not vitiate the policy when issued.

Decision of the Court of Queen's Bench was distinguished in *Anderson v. Pacific F. & M. Ins. Co.* L. R. 7 C. P. 65, 26 L. T. N. S. 130, 20 Week. Rep. 280, 1 Asp. Mar. L. Cas. 220, holding that where the representation was a mere statement of opinion and honestly made it did not vitiate the policy.

—Declaration of goods under open policy.

Cited in notes in 22 L.R.A. 773, on validity of oral insurance contract; 35 L.R.A. 428, on expression of opinion as fraud; 6 E. R. C. 227, on effect of fraud inducing execution of contract.

The decision of the Court of Queen's Bench was cited in *Davies v. National* Notes on E. R. C.—83.

F. & M. Ins. Co. [1891] A. C. 485, 60 L. J. P. C. N. S. 73, 65 L. T. N. S. 560, on the sufficiency of a declaration of goods by the insured.

The decision of the Court of Queen's Bench was distinguished in *Stephens v. Australasian Ins. Co.* L. R. 8 C. P. 18, 42 L. J. C. P. N. S. 12, 27 L. T. N. S. 585, 21 Week. Rep. 228, 1 Asp. Mar. L. Cas. 458, holding that where the usage of the trade made the declaration of ships unnecessary unless erroneous, the declaration may be corrected even after loss.

— **Slip as evidence of misrepresentation.**

The decision of the Court of Queen's Bench was cited in *McDonald v. Doull*, 12 N. S. 276, holding that the slip may be introduced as evidence of the misrepresentation.

13 E. R. C. 491, *STRIBLEY v. IMPERIAL MARINE INS. CO.* 3 Asp. Mar. L. Cas. 134, 45 L. J. Q. B. N. S. 396, 34 L. T. N. S. 281, L. R. 1 Q. B. Div. 507, 24 Week. Rep. 701.

Concealment of material fact by broker effecting reinsurance as vitiating policy.

Cited in note in 13 E. R. C. 527, 530, on necessity of communicating to insurer all matters affecting risk.

Distinguished in *Blackburn, L. & Co. v. Vigors*, 13 E. R. C. 514, L. R. 12 App. Cas. 531, 57 L. J. Q. B. N. S. 114, 57 L. T. N. S. 730, 36 Week. Rep. 449, 6 Asp. Mar. L. Cas. 216, holding that where the first brokers had knowledge of the loss of the ship, but the owners did not and they effected a reinsurance in good faith the knowledge of the brokers was not that of the owners and the policy was valid.

Policy as affected by erroneous statement of belief or expectation.

Cited in note in 13 E. R. C. 534, on effect on policy of statement of belief or expectation not borne out by the event.

13 E. R. C. 501, *CARTER v. BOEHM*, 3 Burr. 1905, 1 Smith, Lead. Cas. 11th ed. 491, 1 W. Bl. 593.

Concealment as avoiding policy of insurance.

Cited in *Equitable Life Assur. Soc. v. McElroy*, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631, holding that the intentional omission by the insured of a material fact, though coming into existence after application is made, avoids the policy; *Clark v. Manufacturers' Ins. Co.* 8 How. 235, 12 L. ed. 1061, holding that concealment which make the risk different from what the insurer agreed to, avoids the policy; *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578, on the want of good faith in making the insurance contract as vitiating the policy; *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8, holding that the failure to communicate a material fact, which is unknown to the insured, will not vitiate the policy; *Birmingham v. Empire Ins. Co.* 42 Barb. 457, holding that where insured was called upon by insurers to communicate nature of his interest in property, he was bound to state it accurately and fully; *New York Bowery F. Ins. Co. v. New York F. Ins. Co.* 17 Wend. 359, holding that the withholding of a material fact, though done unintentionally, vitiates the policy; *Seton, M. & Co. v. Low*, 1 Johns. Cas. 1, holding that the concealment of any circumstance, unknown to the insurer, which would enhance the premium, avoids the policy; *Pine v. Vanuxem*, 3 Yeates, 30, as to what concealment of circumstances will vitiate a policy; *Cloud v. Calhoun*, 10 Rich. Eq. 358, on the distinction between

concealment and forbearance to speak as to their effect upon contracts; *Pelzer Mfg. Co. v. American F. Ins. Co.* 36 S. C. 213, 15 S. E. 562, holding that applicant for insurance was bound to disclose, at time of application for insurance, any fact which he knew would be likely to influence insurer in fixing rates or rejecting risk; *Davis v. Scottish Provincial Ins. Co.* 16 U. C. C. P. 176, holding that any material untruth or concealment, fraud or misrepresentation vitiates the policy; *Perry v. British American F. & Life Assur. Co.* 4 U. C. Q. B. 330, on the concealment of a material fact as vitiating a policy; *Seaton v. Heath* [1899] 1 Q. B. 782, 68 L. J. Q. B. N. S. 631, 80 L. T. N. S. 579, 47 Week. Rep. 487, 15 Times L. R. 297, 4 Com. Cas. 193, holding that a concealment of any material fact by the insured would avoid a policy of insurance, guaranteeing the solvency of a person; *Gandy v. Adelaide M. Ins. Co.* L. R. 6 Q. B. 746, 40 L. J. Q. B. N. S. 239, 25 L. T. N. S. 742, 1 Asp. Mar. L. Cas. 188, holding that the concealment of a material fact avoided the policy of insurance.

Cited in note in 33 L. ed. U. S. 384, on what constitutes fraud.

Distinguished in *Dooly v. Hanover F. Ins. Co.* 16 Wash. 155, 58 Am. St. Rep. 26, 47 Pac. 507, holding that where the application for insurance was oral, and no questions were asked the insured he was not guilty of concealment with regard to his title.

— In marine policies.

Cited in *Granger v. Providence-Washington Ins. Co.* 192 Fed. 674, holding that in marine risks, it is immaterial whether or not material fact was fraudulently, or wilfully concealed, provided that it actually affected risk; *Burritt v. Saratoga County Mut. F. Ins. Co.* 5 Hill, 188, 40 Am. Dec. 345, on a misrepresentation or concealment in marine insurance as vitiating the policy.

— Effect of misrepresentation.

Cited in *Rochester German Ins. Co. v. Schmidt*, 151 Fed. 681, holding that a mis-statement of value, innocently made in good faith, does not vitiate the policy; *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521, holding that a misstatement of the interest of the insured in the property, if not done fraudulently, did not vitiate the policy; *Gould v. York County Mut. F. Ins. Co.* 47 Me. 403, 74 Am. Dec. 494, holding that a representation that the stock was unincumbered, when it was covered by a mortgage, avoided the policy; *Clark v. New England Mut. F. Ins. Co.* 6 Cush. 342, 53 Am. Dec. 44, as to what misrepresentation or mistake would avoid a policy; *Bankers L. Ins. Co. v. Miller*, 100 Md. 1, 59 Atl. 116; *Campbell v. Merchants' & F. Mut. F. Ins. Co.* 37 N. H. 35, 72 Am. Dec. 324,—holding that a misrepresentation of a material fact avoids a policy though done in good faith or by mistake; *Dewees v. Manhattan Ins. Co.* 34 N. J. L. 244, holding that misrepresentations in immaterial matter, not fraudulently intended, will not avoid policy unless made in reply to specific inquiry; *Vivar v. Supreme Lodge*, K. P. 52 N. J. L. 455, 20 Atl. 36, holding that known falsity of representation made by applicant for life insurance will not vitiate policy unless representation was material to contract or was deemed so by insurer; *Fowler v. Aetna Ins. Co.* 6 Cow. 673, 16 Am. Dec. 460, holding that a misdescription of property insured, if material avoids the policy, though done by mistake; *Evans v. Columbia F. Ins. Co.* 40 Misc. 316, 81 N. Y. Supp. 933, on misrepresentation as avoiding an insurance policy; *Herbert v. Mercantile F. Ins. Co.* 43 U. C. Q. B. 384, holding that misrepresentation will avoid a contract of insurance.

Cited in note in 13 E. R. C. 536, on effect on policy of statement of belief or expectation not borne out by the event.

Distinguished in *Kimball v. Aetna Ins. Co.* 9 Allen, 540, 85 Am. Dec. 786, hold-

ing that a statement that house would soon be occupied, though it was never occupied did not avoid the policy though it increased the risk; *Redford v. Mutual F. Ins. Co.* 38 U. C. Q. B. 538, holding that a mere statement of opinion though a misstatement of fact, does not vitiate the policy.

— **Knowledge of company or agent as relieving necessity for declaration.**

Referred to as a leading case in *Pelzer Mfg. Co. v. American F. Ins. Co.* 36 S. C. 213, 15 S. E. 562, holding that where an agent has knowledge of the circumstances the party is not bound to make statements unless questioned.

Cited in *Coulon v. Bowne*, 1 Caines, 288, holding that the existence of war at a certain time is such a notorious fact that the underwriter is presumed to have knowledge of it, and it need not be stated; *Merchants' & M. Mut. Ins. Co. v. Washington Mut. Ins. Co.* 1 Handy (Ohio) 408, holding that if the facts as insured is required to disclose are within the knowledge of the insurer or so connected with the subject insured that they are presumed within the knowledge, there is no concealment; *Money v. Union Ins. Co.* 4 M'Cord. L. 511, holding that a fact known to the underwriters need not be stated in the offer; *Ruggles v. General Interest Ins. Co.* 4 Mason, 74, Fed. Cas. No. 12,119, on the knowledge of the insurer as relieving the necessity of disclosing the known fact; *Roth v. City Ins. Co.* 6 McLean, 324, Fed. Cas. No. 12,084, holding that where the agent of the insurer is well acquainted with the property insured, a misrepresentation will not avoid the policy; *Klein v. Union F. Ins. Co.* 3 Ont. Rep. 234, holding that the insured was not bound to make statements regarding information which the insurer has waived, or knows; *Wyld v. London, L. & G. Ins. Co.* 21 Grant, Ch. (U. C.) 458, holding that the insured need not make statements regarding that which the company through its agents already knows.

— **Waiver of disclosure.**

Cited in *Bebbee v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51, 65 Am. Dec. 553, holding that the party need not make a minute disclosure if the party assumes to act without inquiry, after a general statement of facts; *Alton v. First Nat. Bank*, 157 Mass. 341, 18 L.R.A. 144, 34 Am. St. Rep. 285, 32 N. E. 228, on the necessity of disclosure of material facts where party assumes to act without inquiry; *Gates v. Madison County Mut. Ins. Co.* 5 N. Y. 469, 55 Am. Dec. 360; *Kernochan v. New York Bowery F. Ins. Co.* 5 Duer, 1,—on failure to inquire as waiver of explicit disclosure of material facts; *Gedge v. Royal Exch. Assur. Corp.* [1900] 2 Q. B. 214, 69 L. J. Q. B. N. S. 506, 82 L. T. N. S. 463, 9 Asp. Mar. L. Cas. 57, 5 Com. Cas. 229, 16 Times L. R. 344, on the failure to make inquiry as to the risk as a waiver of a disclosure by the insured.

What constitutes a concealment of material fact.

Cited in *Sibley v. Beard*, 5 Ga. 550, holding that the suppression of knowledge of want of title when sale was made, was a concealment of a material fact; *Boggs v. American Ins. Co.* 30 Mo. 63, holding that the fact in order to be material must have been such that it would have enhanced the premium or have caused the insurer to decline the risk; *Gardner v. Hamilton Mut. Ins. Co.* 33 N. Y. 21, holding that failure to disclose facts, which it was to the interest of the other to know, with the intent that he should remain ignorant to the other's advantage is active concealment; *Nicoll v. American Ins. Co.* 3 Woodb. & M. 529, Fed. Cas. No. 10,259, holding that the fact in order to be material must increase the risk so as to require a larger premium; *Bates v. Hewitt*, 6 E. R. C. 817, L. R. 2 Q. B. 595, 36 L. J. Q. B. N. S. 282, 15 Week. Rep. 1172, holding that a nondisclosure of the fact that the ship insured was an old war-ship and subject to capture, was a concealment of a material fact, though the underwriter

could have found out if he had searched his own records; *Harrower v. Hutchinson*, L. R. 4 Q. B. 523, L. R. 5 Q. B. 584, 39 L. J. Q. B. N. S. 229, 10 Best & S. 469, 22 L. T. N. S. 684, holding that a nondisclosure of the fact that the vessel was partially to load at another port than that named in the policy, was a concealment of a material fact and vitiated the policy; *Davenport v. Charsley*, 54 L. T. N. S. 372, 34 Week. Rep. 391, holding that the nondisclosure of the intimation that a yearly tenant was about to quit, he having given no notice, did not amount to a concealment so as to vitiate sale of the land.

Necessity that risk insured correspond to one intended.

Cited in *Norris v. Insurance Co. of N. A.* 3 Yeates, 84, 2 Am. Dec. 360, holding that in order that the insurers should be liable for a loss the risk run must correspond with the risk understood and intended to be assumed; *Texas Home Ins. & Bkg. Co. v. Lewis*, 48 Tex. 622, holding that when agent of insurance company, to whom facts were correctly stated, makes a mistake in reducing application to writing, act of agent will operate as estoppel to prevent company from making warranty available as defense.

Necessity of consideration to sustain provision in policy limiting time for bringing action.

Cited in *Barnes v. McMurtry*, 29 Neb. 178, 45 N. W. 160, holding that to sustain provision in contract that action thereon must be brought within time less than is fixed by statute of limitations, there must be consideration; unless it was within contemplation of parties when contract was made.

Contract of insurance defined.

Cited in *Smith v. Cash Ins. Co.* 1 Pittsb. 428, 6 Pitts. L. J. 21, for a definition of a contract of insurance; *Citizens' Ins. Co. v. Parsons*, 4 Can. S. C. 215 (dissenting opinion), on the nature of a contract of insurance.

Cited in *Smith*, Pers. Prop. 229, on subject-matter of contract of insurance.

Implied conditions in policy of marine insurance.

Distinguished in *Gibson v. Small*, 14 E. R. C. 86, 4 H. L. Cas. 353, 1 C. L. R. 363, 17 Jur. 1131, holding that there is no implied condition that a ship is seaworthy at the time insurance is taken.

Recovery of premiums paid.

Cited in *Ætna L. Ins. Co. v. Paul*, 10 Ill. App. 431, on the recovery of premiums paid.

Bad faith as avoiding a contract.

Cited in *Broome v. Beers*, 6 Conn. 198; *Bollman v. Loomis*, 41 Conn. 581,—on bad faith in making a contract as avoiding the same, if a party is misled to his injury; *Steward v. Richardson*, 2 Yeates, 89, as to what concealment will avoid a contract.

Statute of frauds as a means of fraud.

Cited in *Warnock v. Wightman*, 1 Brev. 331, holding that the statute of frauds should be construed liberally so as not to be made a means of protecting fraud; *Thompson v. Dulles*, 5 Rich. Eq. 370, as to what will take a contract out of the statute of frauds; *Jennings v. Robertson*, 3 Grant, Ch. (U. C.) 513; *Bristol, C. & S. Aerated Bread Co. v. Maggs*, L. R. 44 Ch. Div. 616, 59 L. J. Ch. N. S. 472, 62 L. T. N. S. 416, 38 Week. Rep. 393,—holding that the statute of frauds should not be made a means of protecting fraud.

Liability of principal for acts of his agent.

Cited in *Johnston v. South Western Railroad Bank*, 3 Strobb. Eq. 263 (dissenting opinion), on the civil liability of a principal for the acts of his agent.

Admissibility of opinion of witness.

Cited in *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, holding that experts are not permitted to state their opinions in matters of common knowledge; *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark. 140, 26 S. W. 598, holding that non-expert witness may testify his opinion as to how far headlight of locomotive engine throws light forward and to right and left; *District of Columbia v. Haller*, 4 App. D. C. 405, holding that question of whether or not, at time of accident, sidewalk was in safe or a dangerous condition, is not subject of expert testimony; *Belair v. Chicago & N. W. R. Co.* 43 Iowa, 662; *Hellyer v. People*, 186 Ill. 550, 58 N. E. 245; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Linn v. Sigsbee*, 67 Ill. 75,—holding that opinions of witnesses are not competent where inquiry is into subject matter, nature of which does not require any peculiar habit, study or scientific knowledge to understand it; *Pufsifer v. Berry*, 87 Me. 405, 32 Atl. 986; *Mayhew v. Sullivan* Min. Co. 76 Me. 100,—holding that the testimony of experts is inadmissible on subjects upon which the jury is competent to form an opinion without the aid of expert opinion; *Kelley v. Richardson*, 69 Mich. 430, 37 N. W. 514 (dissenting opinion), on admissibility of opinion of attorney as to value of attorney's services; *Cook v. State*, 24 N. J. L. 843, holding that physician cannot be asked his opinion, as expert, upon matters of which others, not possessing his professional skill, could judge as correctly as the physician; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, holding that opinion of witness engaged in insurance business as to materiality of fact, that building insured had shortly before been on fire, and effect it would have on mind of prudent underwriter, if communicated, are not admissible in evidence; *Fraser v. Tupper*, 29 Vt. 409, holding that in action for improperly setting fires to brush on defendants land, whereby they were communicated to plaintiff's land, opinions of witnesses who were present, as to suitability of day for setting such fire, are not admissible; *State v. Noakes*, 70 Vt. 247, 40 Atl. 249, holding that it was proper to permit state to show that infant's skull could be fractured by pressure of the hands, in prosecution for crime of killing infant; *Rowley v. London & N. W. R. Co.* L. R. 8 Exch. 221, 42 L. J. Exch. N. S. 153, 29 L. T. N. S. 180, 21 Week. Rep. 869 (dissenting opinion), on the admissibility of expert testimony.

Distinguished in *Sellman v. Wheeler*, 95 Md. 751, 54 Atl. 512, holding that a statement of facts descriptive of a condition of which he was competent to testify, in an action in tort, was admissible.

— As to materiality of facts to insurer's risk.

Referred to as a leading case in *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co.* 38 L.R.A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413, holding that the opinion of an expert as to the materiality of a concealed fact, was inadmissible.

Cited in *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 297, 7 Am. Rep. 522, holding that testimony of the insurer's agent that leaving a house vacant by usage made the risk greater, was inadmissible; *Hill v. Lafayette Ins. Co.* 2 Mich. 476, on the admissibility of opinions as to the materiality of the facts withheld from the insurer; *Hahn v. Guardian Asso. Co.* 23 Or. 576, 37 Am. St. Rep. 709, 32 Pac. 683, holding that question whether risk was increased by changing building which was used as general merchandise store and lighted with coal-oil lamps, to variety theatre and lighting it with electric lights, is not proper subject of expert testimony.

Qualifications of expert witnesses.

Cited in *Muldowney v. Illinois C. R. Co.* 36 Iowa, 462, holding that brakeman is not competent to give opinion as expert respecting coupling of cars, and as to danger brakeman would incur by attempting to make coupling under certain circumstances; *Davis v. State*, 38 Md. 15; *Sallwasser v. Hazlitt & Co.* 18 Ill. App. 243; *Doud v. Guthrie*, 13 Ill. App. 653,—holding that opinion of witnesses possessing peculiar skill, is admissible whenever subject matter of inquiry is such that inexperienced persons cannot form correct judgment upon it without such assistance; *State v. Nevada C. R. Co.* 28 Nev. 186, 113 Am. St. Rep. 834, 81 Pac. 99, holding that where witness had not made computations of railroad earning balances for series of years, as to which he was asked to testify, he was not entitled to testify thereto; *Ellingwood v. Bragg*, 52 N. H. 488, holding that practicing lawyer who had only ordinary experience in examining hand writing was not expert in that respect; *Convery v. Conger*, 53 N. J. L. 468, 22 Atl. 43, holding that witness who had repaired and adjusted several hundred ballot box machines of certain patents might give opinion whether marks upon ballots lying before him were such as machine of that pattern, might make; *Nelson v. Sun Mut. Ins. Co.* 71 N. Y. 453; *Ellis v. Thomas*, 84 App. Div. 626, 82 N. Y. Supp. 1064,—holding that expert is one instructed by experience, and to become such requires course of previous habit and practice or study, so as to be familiar with subject; *State v. Jacobs*, 51 N. C. (6 Jones, L.) 284, holding that one who testifies that he has been for twelve years manager of slaves, and gave much attention to intermixture of races is competent to testify upon question whether person is free negro.

— Question of fact for the court.

Cited in *Jones v. Tucker*, 41 N. H. 546; *Dole v. Johnson*, 50 N. H. 452,—holding that whether witness is qualified to testify as an expert in question of fact to be decided by court.

Competency of testimony.

Cited in *Duvall v. Darby*, 38 Pa. 56, holding that testimony as to facts within compass of memory must be distinct and positive, yet where "impressions" testified to by witness, was evidently derived from recollection of words used, it was evidence to go to jury.

13 E. R. C. 514, *BLACKBURN, L. & CO. v. VIGORS*, L. R. 12 App. Cas. 531, 6 Asp. Mar. L. Cas. 216, 57 L. J. Q. B. N. S. 114, 57 L. T. N. S. 730, 36 Week. Rep. 449, reversing the decision of the Court of Appeal, reported in L. R. 17 Q. B. Div. 553.

Concealment of a material fact as avoiding a policy of insurance.

Cited in *Equitable Life Assur. Soc. v. McElroy*, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631, holding that a failure to disclose the fact of illness occurring subsequent to the application but before receiving the policy avoided the policy.

Cited in notes in 6 Eng. Rul. Cas. 832, on avoidance of insurance contract for failure of insured to disclose all material facts; 13 E. R. C. 499, on necessity of communicating to insured all matters affecting risk.

— By agent through whom policy was not effected.

Cited in *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19, holding a nondisclosure by the agent of the fact of the principal's sickness, in accepting the policy applied for by the principal, avoided the policy; *Pickles v. Western Assur. Co.* 40 N. S. 327, on the concealment by the master of the vessel of the injury to the ship as avoiding policy procured by another agent; *Wilson v.*

Salamandra Assur. Co. 8 Com. Cas. 132, 88 L. T. N. S. 96, 19 Times L. R. 229, 9 Asp. Mar. L. Cas. 370, holding that knowledge by surveyor of plaintiffs of the damage to property insured by the plaintiff's underwriters does not vitiate the policy.

Distinguished in *Blackburn v. Haslam*, L. R. 21 Q. B. Div. 144, 57 L. J. Q. B. N. S. 479, 59 L. T. 407, 36 Week. Rep. 855, 6 Asp. Mar. L. Cas. 326, holding that where the agent of the brokers effecting the insurance had knowledge of the destruction of the ship, the policy was void for concealment.

Implied conditions in insurance policies.

The decision of the Court of Appeal was cited in *Evans v. Columbia F. Ins. Co.* 40 Misc. 316, 81 N. Y. Supp. 933, holding that there is implied condition in all policies of insurance that material representations of fact made by insured are true.

Charging principal with agent's knowledge.

Citing in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496, on the charging of a principal with the agents' knowledge.

Cited in *Tiffany*, Ag. 259, 263, on imputing agent's knowledge to principal.

13 E. R. C. 532, *BARBER v. FLETCHER*, 1 Dougl. K. B. 305.

Misrepresentation as to date of sailing of ship as avoiding policy.

Cited in *Baxter v. New England Ins. Co.* 3 Mason, 96, Fed. Cas. No. 1,127, holding that a misrepresentation as to the date of the sailing of the ship avoided the policy, where ship had already sailed.

Avoidability of misrepresentation made to first underwriter as a defense by subsequent underwriters.

Cited in *Grant v. Ætna Ins. Co.* C. R. 4 A. C. 490 (reversing the court of Queen's Bench which affirmed 11 Lower Can. Rep. 128), on the point that a representation made to the first underwriter may be availed of by subsequent underwriters in an action on a policy.

13 E. R. C. 533, *BOWDEN v. VAUGHAN*, 10 East, 415, 10 Revised Rep. 340.

Oral misrepresentation as to future condition of subject insured as avoiding policy.

Cited in *Kimball v. Ætna Ins. Co.* 9 Allen, 540, 85 Am. Dec. 786, holding a representation that the house insured would be occupied in a few days, did not avoid the policy though the house did not become occupied.

—Of time of sailing of ship.

Cited in *Baxter v. New England Ins. Co.* 3 Mason, 96, Fed. Cas. No. 1,127, holding a misstatement of the fact that the ship would sail at a certain time, when in fact it had sailed, avoided the policy; *Allegre v. Maryland Ins. Co.* 2 Gill & J. 136, 20 Am. Dec. 424, holding that a misrepresentation of the time of sailing of the vessel insured did not avoid the policy.

Effect of failure of insured to notify insurer that vessel has sailed.

Cited in *Perry v. British America F. & L. Assur. Co.* 4 U. C. Q. B. 330, holding that where party assuring vessel omits to mention to underwriters that she then sailed, omission although assured knew fact, will not vitiate policy; unless vessel be, at time, what is called "a missing ship."

13 E. R. C. 540, *PAWSON v. WATSON*, Cowp. pt. 2, p. 785, 1 Dougl. K. B. 11, note.

Representation distinguished from warranty.

Cited in *Lunt v. Boston Marine Ins. Co.* 19 Blatchf. 151, 6 Fed. 562; *Nicoll v. American Ins. Co.* 3 Woodb. & M. 529, Fed. Cas. No. 10,259,—on the distinction between a warranty and a representation; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352, holding that a representation is a verbal or written statement by the assured before the subscription of the policy, tending to induce the insurer to more readily assume the risk; *Richards v. Protection Ins. Co.* 30 Me. 273, holding that a representation that property insured belongs to a certain classification is a warranty of that fact; *White v. Provident Sav. L. Assur. Soc.* 163 Mass. 108, 27 L.R.A. 398, 37 N. E. 771, holding that a representation in an application may be made a warranty and a part of the contract by sufficient reference to the application in the policy; *Dewees v. Manhattan Ins. Co.* 34 N. J. L. 244, holding that a representation is a part of the preliminary proceedings in proposing the contract, while a warranty is a part of the contract when completed; *Fitzgerald v. Supreme Council Catholic Mut. Ben. Asso.* 39 App. Div. 251, 56 N. Y. Supp. 1005, holding that statements of the insured contained in the application and the medical examiner's report are representations and not warranties; *Mackie v. Pleasants*, 2 Binn. 363, holding that a representation may be equitably and substantially answered, but a warranty must be strictly complied with.

Cited in *Smith, Pers. Prop.* 232, on warranties and representations by insured.

What constitutes a warranty in marine policy.

Cited in *Grant v. Ætna Ins. Co.* C. R. 4 A. C. 490 (reversing the Court of Queen's Bench which affirmed 11 Lower Can. Rep. 128), and holding that when a marine policy against fire for one year was executed July 30th of a certain year on a steamer stated in the policy as lying at a certain dock and "that the intention was to navigate the St. Lawrence and the lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up in the winter at a place approved" by the insurer there was no warranty that the ship would navigate in the manner described in the policy and that the insurer was liable for a loss occurring in June of the next year while the vessel was still at the dock.

Falsity of warranty as avoiding a contract.

Cited in *Cameron v. Mount*, 86 Wis. 477, 22 L.R.A. 512, 56 N. W. 1094, holding that a warranty avoided a contract if false, even though the party making it did not know of its falsity.

Cited in 2 *Meechem, Sales*, 1064, on warranty of goods sold as a collateral agreement.

—Policy of insurance.

Cited in *Dwyer v. Mutual L. Ins. Co.* 72 N. H. 572, 58 Atl. 502, holding that a falsity of statements which the applicant has warranted to be true avoids the policy.

—Deviation from warranty as avoiding policy of insurance.

Cited in *Western Assur. Co. v. Redding*, 15 C. C. A. 619, 30 U. S. App. 442, 68 Fed. 708, holding that a strict compliance with a warranty was necessary; *Wells, F. & Co. v. Pacific Ins. Co.* 44 Cal. 397, holding that an express warranty must be strictly complied with; *Ætna Ins. Co. v. Johnson*, 127 Ga. 491, 9 L.R.A. (N.S.) 667, 56 S. E. 643, 9 Ann. Cas. 461, on the necessity of strict compliance with a promissory warranty; *Grant v. Lexington F. L. & M. Ins. Co.* 5 Ind.

23, 61 Am. Dec. 74; Roumage v. Mechanics F. Ins. Co. 13 N. J. L. 110,—holding that a warranty must be strictly performed whether material or not; Bulkley v. Derby Fishing Co. 1 Conn. 571; Hand v. Baynes, 4 Whart. 204, 33 Am. Dec. 54,—holding that noncompliance with warranty avoided the contract of insurance even though caused by necessity and inevitable accident.

Necessity of warranty being contained in the instrument itself.

Cited in Clark v. Manufacturers' Ins. Co. 2 Woodb. & M. 472, Fed. Cas. No. 2,829, on the necessity of a warranty being contained in the policy; Coykendall v. Robinson, 39 N. J. L. 89, 23 Am. Rep. 198, holding that representations to the company contained in the application for insurance are not warranties unless made a part of the policy, but by more than general reference; Delonguemare v. Tradesmen's Ins. Co. 2 Hall, 629, holding that to be a warranty the statement must be a part of the contract and appear on the face of the policy; Jefferson Ins. Co. v. Cotheal, 7 Wend. 72, 22 Am. Dec. 567, holding that the description of property in an application for insurance is not a warranty unless inserted in the policy or by sufficient reference to it; Campbell v. Merchants' & F. Mut. F. Ins. Co. 37 N. H. 35, 72 Am. Dec. 324; Snyder v. Farmers' Ins. & Loan Co. 13 Wend. 92,—on the necessity of a warranty appearing on the face of the policy; Cope v. Scottish Union & Nat. Ins. Co. 5 B. C. 329, holding that to make provisions of written instruments valid as warranties they must be inserted in policy.

Cited in note in 30 L.R.A. 642, on effect of riders attached to insurance policies.

Misrepresentation as avoiding a policy of insurance.

Cited in Curry v. Commonwealth Ins. Co. 10 Pick. 535, 20 Am. Dec. 547, holding that a warranty must be strictly complied with while a representation only substantially and unless false in a material point does not avoid the policy; Kimball v. Aetna Ins. Co. 9 Allen, 540, 85 Am. Dec. 786, holding that representation that the house would be occupied at some future time did not avoid the policy, though it was not so occupied.

—Contracts generally.

Referred to as a leading case in American Bonding & T. Co. v. Burke, 36 Colo. 49, 85 Pac. 392, holding that a representation material to the risk if untrue avoided the policy whether or not made in good faith.

Cited in Smith v. Mitchell, 6 Ga. 458, holding that an affirmation of a thing, in fact untrue, but of which the person has no knowledge is a misrepresentation such as avoids a contract.

Evidence of misrepresentation.

Cited in Dow v. Whetlen, 8 Wend. 160, on the "slip" of the policy as competent evidence of misrepresentation.

Intentional misrepresentation as fraud.

Cited in Sibley v. Beard, 5 Ga. 550, on intentional misrepresentation as fraud; Browning v. National Capital Bank, 13 App. D. C. 1; Smith v. Chadwick, L. R. 20 Ch. Div. 27, 51 L. J. Ch. N. S. 597, 46 L. T. N. S. 702, 30 Week. Rep. 661,—holding that if a party speaks affirmatively of that of which he has no information, and it is untrue, he is guilty of fraud.

Parol evidence to add to a written contract.

Cited in Lunt v. Boston Marine Ins. Co. 17 Fed. 411, on the admission of parol evidence to add to or alter written contracts.

13 E. R. C. 547, *POTTS v. BELL*, 8 T. R. 548, 5 Revised Rep. 452.

See S. C. 2 E. R. C. 654.

13 E. R. C. 547, *BIRD v. APPLETON*, 5 Revised Rep. 468, 8 T. R. 562.

Time of attaching of a policy containing words, "from and at."

Cited in *Seamans v. Loring*, 1 Mason, 127, Fed. Cas. No. 12,583, on the time of the attaching of a policy containing the words, "from and at."

Illegality of acts on voyage as avoiding the insurance.

Cited in *Clark v. Protection Ins. Co.* 1 Story, 109, Fed. Cas. No. 2,832, holding that it is immaterial at what part of the voyage the illegality occurred, the insurance on that voyage is void as to all.

Illegal acts on former voyage as affecting cargo on subsequent one.

Cited in *Sturges v. Bush*, 5 Day, 452, on the illegality of acts done on former voyage as affecting present cargo; *Kemble v. Rhinelander*, 3 Johns. Cas. 130, holding that the fact that the ship had been formerly employed in illicit trade, could not affect the cargo on this voyage.

Sentence of a foreign court as falsifying the warranty of neutrality.

Cited in *Baxter v. New England M. Ins. Co.* 6 Mass. 277, 4 Am. Dec. 125, holding that in an action upon a policy, the sentence of a foreign court of admiralty, condemning a ship for breach of blockade, is conclusive evidence to falsify a warranty of neutrality; *United States v. The Ohio*, 9 Phila. 448, Fed. Cas. No. 15,915, 29 Phila. Leg. Int. 252, on the prohibitions necessary to make trading and intercourse illegal; *Faudel v. Phoenix Ins. Co.* 4 Serg. & R. 29, holding that an infringement of some unjust ordinance of one nation which is contrary to international law, is not a breach of warranty of neutrality so as to avoid the insurance; *Baring v. Clagett*, 14 E. R. C. 155, 3 Bos. & P. 201, 6 Revised Rep. 759; *Baring v. Royal Exch. Assur. Co.* 5 East, 99, 7 Revised Rep. 657,—on the sentence of condemnation of a foreign court as negating warranty of neutrality.

Distinguished in *Castrique v. Imrie*, 5 E. R. C. 899, 39 L. J. C. P. N. S. 350, L. R. 4 H. L. 414, 23 L. T. N. S. 48, 19 Week. Rep. 1, holding that a judgment in rem of a foreign court, having possession of the property cannot be disturbed, though against an alien without its jurisdiction.

Enforcement of illegal contract.

Cited in *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415, on the enforcement of an illegal contract.

Illegality of original contract as avoiding subsequent related contracts.

Distinguished in *Shelton v. Marshall*, 16 Tex. 344, holding that if the original contract is illegal, any subsequent contract which carries it into effect is illegal also.

13 E. R. C. 563, *USPARICHA v. NOBLE*, 13 East, 332, 12 Revised Rep. 360.

Legality of insurance upon property of alien enemy.

Cited in *Francis v. Ocean Ins. Co.* 6 Cow. 404, on the legality of insurance upon the property of an alien enemy.

Right of agent procuring insurance to sue in his own name.

Cited in *Barnes v. Union Mut. F. Ins. Co.* 45 N. H. 21, holding that an agent, by whom insurance is obtained in his own name for the benefit or another, may maintain an action upon the policy in his own name.

Rights of alien enemies licensed by the government.

Cited in *Taylor v. Carpenter*, 2 Woodb. & M. 1, Fed. Cas. No. 13,785, on pleas of alienage as a defense; *Crawford v. The William Penn*, Pet. C. C. 106, Fed. Cas. No. 3,372, on the right of an alien enemy licensed to trade, to sue in the courts of England; *Society for Propagation of Gospel v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156, on the right of the government to grant letters of protection to alien enemies; *United States v. 100 Barrels of Cement*, Fed. Cas. No. 15,945, on a license granted to an alien enemy to trade as removing all disabilities, and legalizing trade with him.

Object of registration acts.

Cited in *Starr v. Knox*, 2 Conn. 215, on object of the acts for registration of ships.

13 E. R. C. 569, *SPITTA v. WOODMAN*, 11 Revised Rep. 628, 2 Taunt. 416.

Inception of risk under policy reading to commence at and from loading of the goods.

Cited in *Wells, F. & Co. v. Pacific Ins. Co.* 44 Cal. 397, holding that where the policy read from and immediately following the loading upon a certain ship, it took effect immediately, when the property was on board the ship at the port named, though not loaded there; *Stony v. Union Ins. Co.* 3 McCord, L. 387 (dissenting opinion), on the inception of the risk under a policy reading at and from; *Creighton v. Union M. Ins. Co.* 2 N. S. 195, holding that where the policy read to cover the vessel from the commencement of loading and the goods, from the loading thereof on board, the risk commenced at the time of sailing from that place though loaded at another; *Horney v. Lushington*, 13 E. R. C. 637, 15 East, 46, 3 Campb. 83, 13 Revised Rep. 759, holding that a clause in the policy making it operative on goods "at and from" a certain point will not cover goods loaded before reaching the port; *Joyce v. Realm Ins. Co.* L. R. 7 Q. B. 580, 41 L. J. Q. B. N. S. 356, 27 L. T. N. S. 144, 1 Asp. Mar. L. Cas. 194, on the reference to an antecedent policy as rebutting the presumption that they were to be loaded during the voyage.

Distinguished in *Clark v. Higgins*, 132 Mass. 586, holding, under state decisions, that a policy, on goods at and from a certain port, without more does not imply that the goods shall be loaded at that port: *Bell v. Hobson*, 13 E. R. C. 578, 16 East, 240, 14 Revised Rep. 337, holding that where there was a clause to indicate that a prior loading was contemplated, such as that the policy was a continuation of a former policy on the voyage, the plaintiff could recover.

Rights on policy where only part of freight to be covered is shipped.

Cited in note in 13 E. R. C. 690, on extent of recovery on valued policy where only part of freight intended is shipped.

Validity of insurance where trading with alien enemy under government license.

Cited in note in 13 Eng. Rul. Cas. 567, on validity of insurance on goods of merchant engaged in trade with alien enemy under government license.

13 E. R. C. 578, *BELL v. HOBSON*, 3 Campb. 272, 16 East, 240, 14 Revised Rep. 337.

Inception of risk on goods on voyage.

Cited in *Wells, F. & Co. v. Pacific Ins. Co.* 44 Cal. 397, holding that a policy

upon goods at and from the time of their loading at a certain port, takes effect when those goods are on board the ship at that port, though loaded at a previous port; *Clark v. Higgins*, 132 Mass. 586, on the words requiring goods to be loaded at the port of departure, as being controlled by special memorandum or circumstances; *Creighton v. Union M. Ins. Co.* 2 N. S. 195, holding that a policy to cover a vessel from the commencement of loading and on goods from the loading thereof on board, took effect from the sailing of the vessel from that place, though loaded previously, if there is anything to indicate that a prior loading was intended; *Joyce v. Realm M. Ins. Co.* L. R. 7 Q. B. 580, 41 L. J. Q. B. 356, 27 L. T. N. S. 144, 1 Asp. Mar. L. Cas. 194, holding that the clause reading at and from the loading, was qualified by one providing that outward cargo was to be considered homeward interest for a certain length of time.

Rights on marine policy where only part of intended freight is shipped.

Cited in note in 13 E. R. C. 690, on extent of recovery on valued policy where only part of freight intended is shipped.

13 E. R. C. 587, *CONSTABLE v. NOBLE*, 11 Revised Rep. 617, 2 Taunt. 403.

Policy on goods at and from a certain place as attaching to goods loaded at another place within port limits.

Cited in *Hennessy v. New York Mut. M. Ins. Co.* 5 N. S. 259, on usage of trade as making policy attach upon goods loaded within the port, though not at place named; *Fisher v. Western Assur. Co.* 11 U. C. Q. B. 255, holding that where the policy read to Kingston and from there to Montreal, it did not include the port of Kingston which might have included Port Sidney, where ship was lost.

Cited in note in 13 Eng. Rul. Cas. 585, on time when marine insurance risk attaches.

Distinguished in *Silloway v. Neptune Ins. Co.* 12 Gray, 73, holding that a policy of insurance upon a cargo, at and from a certain port, is not, by reason of such description avoided because loaded at a previous port.

13 E. R. C. 590, *MOXON v. ATKINS*, 3 Campb. 200, 13 Revised Rep. 789.

Usage as to meaning of terms.

Cited in *Bowen v. Newell*, 2 Duer, 584, on usage as controlling written contract.

Usage to include limit of port within terms of policy.

Cited in *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568, 11 Sup. Ct. Rep. 1, holding that it is not a deviation to touch at a port out of its course, if such departure is within the usage of the trade; *Gerow v. Providence Washington Ins. Co.* 28 N. B. 435, on the sufficiency of evidence of usage to show that a port was a port of loading within the territory named in the policy; *Hennessy v. New York Mut. M. Ins. Co.* 5 N. S. 259, holding that a policy did not attach upon goods loaded at a place different from that name, though sometimes treated as within the port limits, where such usage was not general.

Distinguished in *Smith v. Mobile Nav. & Mut. Ins. Co.* 30 Ala. 167, holding that parol evidence of custom is inadmissible to show that a policy of marine insurance covers the overland transportation by railroad to place of loading.

—Duration of policy.

Cited in *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 27 Ala. 77, holding that the port of New Orleans, in a marine policy means the usual

place of landing goods, though of a different name; *Grant v. Lexington F. L. & M. Ins. Co.* 5 Ind. 23, 61 Am. Dec. 74, holding that where the risk was on the voyage from Lawrenceburg to New Orleans, and Freeport was the hay-market of New Orleans the policy continued in force while the boat was unloading its hay at Freeport.

13 E. R. C. 595, *HILL v. PATTEN*, 1 Campb. 72, 8 East, 373, 9 Revised Rep. 469.

Outfit of ship as covered by policy upon cargo.

Cited in *Taber v. China Mut. Ins. Co.* 131 Mass. 239, holding that the outfits of a whaling voyage are not covered by a policy of insurance upon the ship, and probably not by one on the cargo; *Thwing v. Great Western Ins. Co.* 103 Mass. 401, 4 Am. Rep. 567, as to whether coal shipped for "dunnage," and ballast was covered by a policy on the cargo; *Folsom v. Merchants' Mut. M. Ins. Co.* 38 Me. 414, holding that a policy upon the outfit of a fishing schooner did not cover any of the cargo.

What is included under outfit of ship.

Cited in *Hancox v. Fishing Ins. Co.* 3 Sumn. 132, 1 Fed. Cas. No. 6,013, on the supplies and clothing of the crew, as a part of the outfit of the ship; *The Ontario*, 2 Low. Dec. 40, Fed. Cas. No. 10,543, on the word appurtenances as including the outfit of whalers.

What property is covered by the term goods.

Cited in *Chicago & A. R. Co. v. Thompson*, 19 Ill. 578, as to bank bills being goods when used in connection with railroads as common carrier of goods; *Chamberlain v. Western Transp. Co.* 45 Barb. 218, as to what property is covered by the terms "goods and merchandise."

Successive cargoes on trading voyage as covered by policy under word goods.

Cited in *Merchants' M. Ins. Co. v. Rumsey*, 9 Can. S. C. 577, on successive cargoes in the course of trading voyage as being covered by policy upon goods.

Alteration of policy by mutual consent.

Cited in *Osgood v. Glover*, 7 Daly, 367, holding that an insurance policy can be surrendered only by the consent of both parties to it.

Distinguished in *Noble v. Ward*, L. R. 2 Exch. 135, 6 Eng. Rul. Cas. 563, 36 L. J. Exch. N. S. 91, 15 Week. Rep. 520, 15 L. T. N. S. 672, holding that a parol agreement void under the statute of frauds did not imply a rescission of the former contract.

13 E. R. C. 598, *TOBIN v. HARTFORD*, 17 C. B. N. S. 528, 10 Jur. N. S. 850, 34 L. J. C. P. N. S. 37, 10 L. T. N. S. 817, 12 Week. Rep. 1062, affirming the decision of the Court of Common Pleas, reported in 13 C. B. N. S. 791, 32 L. J. C. P. N. S. 134.

Recovery for total loss of partial cargo under valued policy.

Cited in *Voisin v. Providence Washington Ins. Co.* 51 App. Div. 553, 65 N. Y. Supp. 333, holding that under a valued policy the recovery is limited to that proportion of the face value of the policy which the amount actually shipped bore to the amount which formed the basis of the valuation; *Denoon v. Home & C. Assur. Co.* L. R. 7 C. P. 341, 41 L. J. C. P. N. S. 162, 26 L. T. N. S. 628, 20 Week. Rep. 970, 1 Asp. Mar. L. Cas. 309, on the operation of a valued policy in case of a total loss of a partial cargo.

What constitutes a valued policy and conclusiveness as to valuation.

Cited in note in 14 E. R. C. 229, on what constitutes a valued policy, and conclusiveness of the valuation.

Right to return of premium where risk has never been entered upon.

Cited in note in 14 E. R. C. 519, on right to return of premium where risk has never been entered upon.

13 E. R. C. 608, *PARMETER v. COUSINS*, 2 Campb. 235, 11 Revised Rep. 702.

Inception of risk under policy reading at and from.

Cited in *St. Paul F. & M. Ins. Co. v. Troop*, 26 Can. S. C. 5, holding that a policy reading at and from Sydney to St. John, attached as soon as the ship was within the harbor of Sydney though she did not anchor, and was attempting to leave; *Haughton v. Empire M. Ins. Co.* L. R. 1 Exch. 206, 4 Hurlst. & C. 41, 35 L. J. Exch. N. S. 117, 2 Jur. N. S. 376, 15 L. T. N. S. 80, 14 Week. Rep. 645, 23 Phila. Leg. Int. 189, holding that a policy reading at and from Havana, attached as soon as the ship entered the harbor, and the owner could recover if it was wrecked in the harbor.

Seaworthiness as implied from contract of insurance.

Cited in *Paddock v. Franklin Ins. Co.* 11 Pick. 227, on the warranty of seaworthiness as being implied from contract of insurance.

13 E. R. C. 609, *DE WOLF v. ARCHANGEL MARITIME BANK & INS. CO.*
2 Asp. Mar. L. Cas. 273, 43 L. J. Q. B. N. S. 147, L. R. 9 Q. B. 451, 39 L. T. N. S. 605, 22 Week. Rep. 801.

13 E. R. C. 620, *HURRY v. ROYAL EXCH. ASSUR. CO.* 2 Bos. & P. 430, 5 Revised Rep. 639, affirmed in 3 Esp. 289, 6 Revised Rep. 804.

Duration of liability of insured under policy reading, "until goods are safely landed."

Cited in *Barclay v. Clyde*, 2 E. D. Smith, 95, on the continuance of the liability of a common carrier until goods are delivered; *Mey v. South Carolina Ins. Co.* 1 Treadway, Const. 339, 3 Brev. 329, on the liability of the insurer for goods being carried in the usual course of trade; *Lane v. Nixon*, L. R. 1, C. P. 412, 35 L. J. C. P. N. S. 243, 12 Jur. N. S. 392, 14 Week. Rep. 641, holding that such a policy covers the goods until safely landed on shore and while they are in lighters on the way to shore.

Distinguished in *Strong v. Natally*, 13 E. R. C. 627, 1 Bos. & P. N. R. 16, 8 Revised Rep. 741, holding that where the owner assumed control of the landing of the goods, the underwriters were discharged.

Evidence of usage to explain written contract.

Cited in *Leach v. Perkins*, 17 Me. 462, 35 Am. Dec. 268, holding that usage may be admitted to explain the intention of the parties, but not to establish the right by which their relation arose.

13 E. R. C. 627, *STRONG v. NATALLY*, 1 Bos. & P. N. R. 16, 8 Revised Rep. 741.

Effect of the owner of the goods assuming control before their delivery.

Cited in *Passenger Cases*, 7 How. 283, 12 L. ed. 702, on the termination of the carrier's liability by delivery to consignee; *Stone v. Waitt*, 31 Me. 409,

52 Am. Dec. 621, holding that if the consignee assume charge of the goods before arrival at their destination the carrier is discharged from liability.

13 E. R. C. 631, *SHAWE v. FELTON*, 2 East, 109, 6 Revised Rep. 394.

Duration of risk till "moored in safety," under terms of policy.

Cited in *Mariatigui v. Louisiana Ins. Co.* 8 La. 65, 28 Am. Dec. 129, holding that the insurers were not liable for the barratry, though insured against, when according to the terms of the policy the ship had been moored twenty-four hours in safety.

Cited in *Hughes Adm.* 69, on beginning and end of marine risk.

Meaning of "cargo."

Cited in *Tobin v. Harford*, 13 E. R. C. 598, 34 L. J. C. P. N. S. 37, 13 C. B. N. S. 791, on the effect of a clause in the policy as to "cargo."

Conclusiveness of valued policy.

Cited in *Katheman v. General Mut. Ins. Co.* 12 La. Ann. 35, on the effect of a valued policy; *Davy v. Hallett*, 3 Caines, 16, 2 Am. Dec. 241, holding that the valuation in the policy precludes inquiry into value, in the absence of fraud, even though events have occurred in the course of the voyage to make it more advantageous to the insured; *Whitney v. American Ins. Co.* 3 Cow. 210; *Kane v. Commercial Ins. Co.* 8 Johns. 229,—holding that a valued policy is conclusive on the underwriters where there has been no fraud; *Michael v. Prussian Nat. Ins. Co.* 171 N. Y. 25, 63 N. E. 810, on the conclusiveness of a valued policy; *Sturm v. Atlantic Mut. Ins. Co.* 6 Jones & S. 281, on the object of valuation in a policy; *Merchants & M. Ins. Co. v. Duffield*, 2 Handy (Ohio) 122, on the right to open a valued policy; *Richardson v. Home Ins. Co.* 21 U. C. C. P. 291, holding that it is not open for the insurer to question the insured's interest to the extent of the valuation named in the policy.

Cited in notes in 14 Eng. Rul. Cas. 228, on what constitutes a valued policy, and conclusiveness of the valuation; 13 Eng. Rul. Cas. 692, on conclusiveness of valuation in policy; 1 Eng. Rul. Cas. 64, on right to claim total loss under marine policy without abandonment.

Distinguished in *Forbes v. Aspinwall*, 13 E. R. C. 673, 13 East, 323, 12 Revised Rep. 352, holding that where only a part of the cargo was on the ship when it was destroyed, a valued policy could be opened so as to apportion the loss.

13 E. R. C. 637, *HORNEYER v. LUSHINGTON*, 3 Campb. 85, 15 East, 46 13 Revised Rep. 759.

Inception of risk under policy reading at and from.

Cited in *Clark v. Higgins*, 132 Mass. 586, on the policy reading at and from a certain port as a warranty that the goods will be loaded at that port; *Seamans v. Loring*, 1 Mason, 127, Fed. Cas. No. 12,583, on the inception of the risk under a policy reading at and from; *Stoney v. Union Ins. Co.* 3 M'Cord, L. 387 (dissenting opinion), on the inception of the risk under a policy reading at and from, where part of cargo had been loaded elsewhere; *Creighton v. Union M. Ins. Co.* 2 N. S. 195, holding that where the policy read to cover the goods from the loading thereof on board, the risk commenced at the time of sailing if there was mention of previous loading.

Cited in note in 13 Eng. Rul. Cas. 581, 586, on time when marine insurance risk attaches.

Twenty-four hours "safely moored."

Distinguished in *Lidgett v. Secretau*, L. R. 5 C. P. 190, holding that where the ship arrived in a leaky condition and had to be kept afloat by means of pumps, but was able to be moored in the usual place and discharge its cargo, it was anchored twenty-four hours in safety.

Recovery of insurance for seizure.

Cited in *Maryland & P. Ins. Co. v. Bathurst*, 5 Gill & J. 159, holding that in order to recover for the seizure of the ship, the owner must not have caused the seizure by his own acts.

Distinguished in *Maritime Ins. Co. v. M. S. Dollars S. S. Co.* 100 C. C. A. 547, 177 Fed. 127, holding that under a marine war risk policy expressly stipulating that the assured should be at "liberty to ruin blockade" the insurer thus consented to whatever acts were usually done in such undertakings, including the carrying of simulated papers and that it was liable for a seizure on ground of carrying such papers.

13 E. R. C. 641, *SAMUEL v. ROYAL EXCH. ASSUR. CO.* 8 Barn. & C. 119, 6 L. J. K. B. N. S. 315.

Duration of risk running until ship had been moored for twenty-four hours in safety.

Cited in *Meigs v. Mutual M. Ins. Co.* 2 Cush. 439, holding that where the vessel was prevented from mooring at the dock on account of low water until she had discharged part of her cargo, the policy covered a loss while so waiting to unload; *Simpson v. Pacific Mut. Ins. Co.* Holmes, 136, Fed. Cas. No. 12,886, holding same where prevented from mooring by a bar across the harbor mouth; *Stone v. Ocean M. Ins. Co.* L. R. 1 Exch. Div. 81, holding that when the ship had been at anchor for twenty-four hours at the usual place of discharge, the policy was at an end.

Cited in *Hughes Adm.* 70, on beginning and end of marine risk.

Distinguished in *Mariatigui v. Louisiana Ins. Co.* 8 La. 65, 28 Am. Dec. 129, holding that insurer is not liable for acts of barratry of the captain and mariners insured against in violating the revenue laws by smuggling goods where goods were seized within twenty-four hours after landing at port, but the vessel itself was not seized until after the expiration of twenty-four hours, the vessel being safely moored during such time; *Bramhall v. Sun Mut. Ins. Co.* 104 Mass. 510, 6 Am. Rep. 261, holding that a policy of insurance does not cover a loss occurring after a vessel has lain three weeks at a place to which she was destined as a port of discharge, and having discharged a substantial part of her cargo.

Right of ship owner to choose part of discharge.

Cited in *Dahl v. Nelson*, 9 E. R. C. 235, L. R. 6 App. Cas. 38, 50 L. J. Ch. N. S. 411, 44 L. T. N. S. 381, 29 Week. Rep. 543, 4 Asp. Mar. L. Cas. 392; *Tharsis Sulphur & Copper Co. v. Morel Bros.* [1891] 2 Q. B. 647, 61 L. J. Q. B. N. S. 11, 65 L. T. N. S. 659, 40 Week. Rep. 58, 7 Asp. Mar. L. Cas. 106; *Bulman v. Fenwick* [1894] 1 Q. B. 179, 63 L. J. Q. B. N. S. 123, 9 Reports, 227, 69 L. T. N. S. 651, 42 Week. Rep. 326, 7 Asp. Mar. L. Cas. 388,—on the option of the charterers of the ship to choose the dock for landing.

13 E. R. C. 650, *BLACKENHAGEN v. LONDON ASSUR. CO.* 1 Campb. 454, 10 Revised Rep. 729.

Abandonment of voyage as discharging the insurers.

Cited in *Lawrence v. Ocean Ins. Co.* 11 Johns. 241 (dissenting opinion), on Notes On E. R. C.—84.

the intention to deviate or abandon as discharging the insurers; *Craig v. United Ins. Co.* 6 Johns. 226, 5 Am. Dec. 222, holding that insured cannot abandon quia timet, in cases where danger is remote, but if port of destination is in possession of enemy he may abandon and recover for total loss; *New York Firemen Ins. Co. v. Lawrence*, 14 Johns. 46, holding that where the vessel had been prevented from going to her intended port of discharge but had not reached the dividing point in the route to another port, there had been no abandonment to discharge the insurer; *Snowden v. Phoenix Ins. Co.* 3 Binn. 457, holding that by putting into port for instructions and convoy to enable it to proceed, the vessel had not abandoned its voyage so as to release the insurers; *Savage v. Pleasants*, 5 Binn. 403, 6 Am. Dec. 424, holding that where the ship was stopped by a British privateer, on her way to Antwerp and then refused admission to Antwerp by proceeding to Rotterdam she abandoned the voyage and released the insurer.

Cited in note in 9 Eng. Rul. Cas. 415, on unavoidable necessity as excuse for deviation.

Total loss by blockade or non intercourse.

Cited in *Thompson v. Read*, 12 Serg. & R. 440, on what constitutes a total loss, by reason of blockade.

13 E. R. C. 652, *BROWN v. VIGNE*, 12 East, 283, 11 Revised Rep. 375.

Discharge of insurance where port of destination is in the hands of the enemy.

Distinguished in *Oliverson v. Brightman*, 8 Q. B. 781, 1 Car. & K. 360, 15 L. J. Q. B. N. S. 274, 10 Jur. 875, 13 E. R. C. 656, holding that where the port of discharge was not in the hands of the enemy, and it would not have been unlawful to go there, unloading the goods for the purpose of transshipment, under the policy, did not discharge the policy.

Construction of marine policy.

Cited in *Bradley v. Nashville Ins. Co.* 3 La. Ann. 708, 48 Am. Dec. 465, on construction given by courts to policies which cover risks in port which are not included by express words, but implied by the description of the voyage.

13 E. R. C. 656, *OLIVERSON v. BRIGHTMAN*, 10 Jur. 875, 15 L. J. Q. B. N. S. 274, 8 Q. B. 781, affirming the verdict directed for plaintiff in 1 Car. & K. 360.

Discharge of insurance by transshipment.

Cited in *Field v. Commercial Ins. Co.* 2 Allen. 93, on transshipment as a discharge of the insurance; *Pierce v. Columbian Ins. Co.* 14 Allen, 320, holding that a policy on goods in a particular ship is not discharged where by necessity or condition in the policy, they were transferred to another ship.

13 E. R. C. 673, *FORBES v. ASPINWALL*, 13 East, 323, 12 Revised Rep. 352.

What constitutes valuation.

Cited in *Funke v. Orient Mut. Ins. Co.* 6 Jones & S. 349, to the point that valuation of policy is to fix by agreement estimate upon subject insured, and to supersede necessity of proving actual value, by specifying sum as amount of that value.

Inception of risk under valued policy.

Cited in *Riley v. Hartford Ins. Co.* 2 Conn. 368, holding that a valued policy did not attach till the freight had begun to be earned.

Cited in note in 13 E. R. C. 715, as to when risk commences on insurance of chartered freight.

Conclusiveness of a valued policy.

Cited in *Clark v. Ocean Ins. Co.* 16 Pick. 289; *Sturm v. Atlantic Mut. Ins. Co.* 63 N. Y. 77; *New York & C. Mail S. S. Co. v. Royal Exchange Assur. Co.* 83 C. C. A. 235, 154 Fed. 315; *Sturm v. Atlantic Mut. Ins. Co.* 6 Jones & S. 281,—on the conclusiveness of a valued policy; *Voisin v. Commercial Mut. Ins. Co.* 60 App. Div. 139, 70 N. Y. Supp. 1147 (dissenting opinion); *United States Shipping Co. v. Empress Assur. Corp.* [1907] 1 K. B. 259, 76 L. J. K. B. N. S. 225, 23 Times L. R. 137, 12 Com. Cas. 142,—on the right to open a valued policy.

Cited in note in 14 E. R. C. 228, 229, on what constitutes a valued policy, and conclusiveness of the valuation.

—Right to open in case of total loss of partial cargo.

Cited in *Fay v. Alliance Ins. Co.* 16 Gray, 455, holding that where a part of the cargo had been discharged, and the rest lost, the recovery under the valued policy, should be the proportion of the freight lost to the total amount of freight insured; *Voisin v. Providence Washington Ins. Co.* 51 App. Div. 553, 65 N. Y. Supp. 333, holding that under a valued policy, the recovery is limited to that proportion of the face value of the policy, which the amount of goods actually shipped bore to the amount purported to be shipped under the policy; *Adams v. Pennsylvania Ins. Co.* 1 Rawle, 97, holding that where none of the cargo had been loaded, there could be no recovery under a valued policy; *Denoon v. Home & C. Assur. Co.* L. R. 7 C. P. 341, 41 L. J. C. P. N. S. 162, 26 L. T. N. S. 628, 20 Week. Rep. 970, 1 Asp. Mar. L. Cas. 309, on the operation of a valued property in case of a total loss of a partial cargo; *Tobin v. Harford*, 13 E. R. C. 598, 34 L. J. C. P. N. S. 37, 13 C. B. N. S. 791, holding that where the ship discharged a part of her cargo at one port and was lost on the way to the next, the company was liable only for the proportion of the policy, as the freight lost bore to the full cargo.

Cited in note in 13 E. R. C. 689, 693, on extent of recovery on valued policy where only part of freight intended is shipped.

Distinguished in *Haven v. Gray*, 12 Mass. 71, holding that where the policy was on the goods loaded to return, as the proceeds of the outgoing cargo, and the goods on board were taken on credit, the others not being sold, the policy could not be opened; *Coolidge v. Gloucester M. Ins. Co.* 15 Mass. 341, holding that where the ship has its entire cargo loaded but it is overestimated in making the value, the policy cannot be opened unless for fraud; *McGaw v. Ocean Ins. Co.* 23 Pick. 405, holding that where the total cargo was on board, and only part lost, this exception in favor of opening the policy does not apply; *Robinson v. Manufacturers Ins. Co.* 1 Met. 143, holding that where the whole freight on board was intended to be covered and not what the ship could carry, the policy could not be opened; *Delano v. American Ins. Co.* 42 Barb. 142, holding that where the policy was intended to apply only to that cargo shipped, as where insured after ship has sailed, the policy could not be opened; *De Longue-mere v. New York F. Ins. Co.* 10 Johns. 201, holding that where the cargo had been procured and was ready to be shipped and part actually shipped when loss occurred, the policy could not be opened; *Whitney v. American Ins. Co.* 3 Cow. 210, holding that where the whole cargo was on board the exception in favor of opening the valued policy does not apply; *The Main*, 13 E. R. C. 681, [1894] P. 320, 63 L. J. Prob. N. S. 69, 70 L. T. N. S. 247, 7 Asp. Mar. L. Cas. 424, 6 Reports, 775, holding that where the freight has been partly

prepaid the value of the policy shall be reduced in proportion to that which the prepaid freight pays to the whole freight.

What is included within the meaning of word, ship.

Cited in *Roddick v. Indemnity Mut. M. Ins. Co.* [1895] 1 Q. B. 836, as to what is covered by policy on "ship."

Cited in note in 13 Eng. Rul. Cas. 605, 606, on what is included in the word "ship" in marine policy.

Total loss under valued policy.

Cited in *Rankin v. Potter*, L. R. 6 H. L. 83, 42 L. J. C. P. N. S. 169, 29 L. T. N. S. 142, 22 Week. Rep. 1, 2 Asp. Mar. L. Cas. 65, 1 Eng. Rul. Cas. 70, on what constitutes a total loss under a valued policy.

Right to proportionate return of premium.

Cited in note in 14 E. R. C. 519, on right to proportionate return of premium in cases of over-insurance and short interest.

13 E. R. C. 681, *THE MAIN*, 7 Asp. Mar. L. Cas. 424, 63 L. J. Prob. N. S. 69, 70 L. T. N. S. 247, [1894] P. 320, 6 Reports, 775.

Conclusiveness of valued policy.

Cited in *Voisin v. Providence Washington Ins. Co.* 51 App. Div. 553, 65 N. Y. Supp. 333, holding that where it is shown in action on valued policy that goods of general description of those contained in bills of lading were actually on vessel lost by peril insured against burden is on insurance company to show that all goods were not actually shipped; *S. S. Balmoral Co. v. Martin* [1902] A. C. 511, 71 L. J. K. B. N. S. 819, 87 L. T. N. S. 247, 51 Week. Rep. 173, 7 Com. Cas. 292, 18 Times L. R. 802, 9 Asp. Mar. L. Cas. 321, on the conclusiveness of a valued policy.

Cited in note in 14 E. R. C. 228, on what constitutes a valued policy, and conclusiveness of the valuation.

13 E. R. C. 693, *FLINT v. FLEMYNG*, 1 Barn. & A. 45, 8 L. J. K. B. N. S. 350.

Commencement of risk under policy on freight.

Cited in *Clark v. Ocean Ins. Co.* 16 Pick. 289, holding that where the ship was lost before the amount due under the charter party was earned, the plaintiff had an insurable interest and could recover for the freight of entire voyage.

Distinguished in *Gordon v. American Ins. Co.* 4 Denio, 360, holding that where policy was on goods from and immediately following their loading, the risk did not commence till they were loaded.

Insurable interest of owner of vessel, in freight.

Cited in *Paradise v. Sun Mut. Ins. Co.* 6 La. Ann. 596, holding that if the owner of a ship has loaded it with his own goods, he can recover the ordinary and reasonable freight which he might have earned; *Adams v. Warren Ins. Co.* 22 Pick. 163, holding that where the owner has an inchoate right to freight, he has an insurable interest; *Huth v. New York Mut. Ins. Co.* 8 Bosw. 538, on the insurable interest of the charter party in the freight; *Driscoll v. Millville M. Ins. Co.* 23 N. B. 160, holding the owners of the vessel are prima facie entitled to the freight of goods put on board her for passage.

Cited in notes on 13 Eng. Rul. Cas. 692, on insurable interest of owner of vessel in goods to be shipped on his own account: 13 Eng. Rul. Cas. 311, on right to insure expectant value or profits from success of adventure.

Statement of insurable interest.

Cited in *White v. Hudson River Ins. Co.* 7 How. Pr. 341, on the necessity of a correct statement of insurable interest in the property.

What is included in the term freight as used in policy.

Cited in *Davies v. Home Ins. Co.* 3 U. C. Err. & App. 269, on freight as a subject of insurance; *The Main v. Williams*, 152 U. S. 122, 30 L. ed. 381, 14 Sup. Ct. Rep. 486, as to what is included in the term freight; *The Thyatira*, L. R. 8 Prob. Div. 155, 52 L. J. Prob. N. S. 85, 49 L. T. N. S. 406, 32 Week. Rep. 276, 5 Asp. Mar. L. Cas. 147, holding that the enhanced value of a cargo when carried to a port of sale may be insured as freight; *Denoon v. Home & C. Assur. Co.* L. R. 7 C. P. 341, 41 L. J. C. P. N. S. 162, 26 L. T. N. S. 628, 20 Week. Rep. 970, 1 Asp. Mar. L. Cas. 309, as to whether the term freight, included passage money, under an insurance of freight; *Allison v. British M. Ins. Co.* 42 L. J. C. P. N. S. 334, L. R. 1 App. Cas. 209, 34 L. T. 809, 24 Week. Rep. 1039, 3 Asp. Mar. L. Cas. 178, on the meaning of the word freight, as used in an insurance policy; *Inman S. S. Co. v. Bischoff*, L. R. 7 App. Cas. 670, 52 L. J. Q. B. N. S. 169, 47 L. T. N. S. 581, 31 Week. Rep. 141, 5 Asp. Mar. L. Cas. 6, holding that "freight outstanding" covers the monthly hire of the ship for the time covered by the charter party.

Distinguished in *The Beatrice Havener*, 50 Fed. 232, holding that in an action for damages for collision, a vessel carrying its owner's goods is not earning freight.

13 E. R. C. 697, *BARBER v. FLEMING*, 10 Best & S. 879, 39 L. J. Q. B. N. S. 25, L. R. 5 Q. B. 59, 18 Week. Rep. 254.

Commencement of risk on freight to be earned.

Cited in *Melcher v. Ocean Ins. Co.* 60 Me. 77, holding that the insurable interest commenced when the voyage on which the freight was to be earned, though the ship was lost before that stage of the voyage was reached, and the insurers were liable; *Wylde v. Union M. Ins. Co.* Russell (N. S.) 203, on when the insurable interest of the owner or hirer in freight begins; *Rankin v. Potter*, L. R. 6 H. L. 83, 42 L. J. C. P. N. S. 169, 29 L. T. N. S. 142, 22 Week. Rep. 1, 2 Asp. Mar. L. Cas. 65, 1 Eng. Rul. Cas. 70 (affirming L. R. 5 C. P. 341, 39 L. J. C. P. N. S. 147, 1 E. R. C. 71), on the insurable interest in freight expected to be earned; *Foley v. United F. & M. Ins. Co.* L. R. 5 C. P. 155, 39 L. J. C. P. N. S. 206, 22 L. T. N. S. 108, 18 Week. Rep. 437, holding that where the policy read at and from Mauritius, and the vessel was lost while discharging her cargo at Mauritius, the risk had commenced when she arrived at Mauritius; *Mercantile S. S. Co. v. Tyser*, L. R. 7 Q. B. Div. 73, 29 Week. Rep. 790, 5 Asp. Mar. L. Cas. 6, holding that where the voyage in course of which the freight was to be earned, had commenced, although not that particular part of it for which the freight was to be paid, the risk had commenced.

THIRD CIRCUIT COURT

Hilo, Hawaii

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